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Supreme Court of the United States

MARTIN ROSILLO-PUGA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provided aliens the statutory right to file a motion to reconsider a determination of removability (8 U.S.C. § 1229a(c)(6)(A)) and to reopen removal proceedings. 8 U.S.C. § 1229a(c)(7)(A). The statute expressly imposes limits on the number and timing of such motions, but does not condition the right to file on an alien's geographic location. When the Attorney General promulgated implementing regulations for IIRIRA, however, she retained, without amendment, a pre-IIRIRA regulation barring aliens from filing such motions after the alien has been removed from or has voluntarily departed the United States. The questions presented are:

(1) Whether this regulation, 8 C.F.R. § 1003.23(b)(1), is invalid under IIRIRA because it denies aliens who have been removed or who otherwise have departed the United States their statutory right to file a motion to reopen or reconsider an order of removability.

(2) Whether the Tenth Circuit Court of Appeals may usurp the Immigration Judge's (IJ) and Board of Immigration Appeal's (BIA) discretionary authority to *sua sponte* reconsider or reopen removal proceedings by denying a petition for review based on reasons not articulated in either the IJ's or BIA's orders denying the motion in the first instance.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mr. Martin Rosillo-Puga respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1) is reported at 580 F.3d 1147. The court of appeals' order denying rehearing en banc (App., *infra*, 66) is unpublished.

The order of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 59) is unpublished.

The order of the Immigration Judge denying petitioner's motion to reopen (App., *infra*, 62) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2009. A timely petition for rehearing was denied on December 8, 2009. On March 1, 2010, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to May 7, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

[8 U.S.C. §§ 1229a(c)(6)A) and (c)(7)(A)]

[8 C.F.R. § 1003.23(b)(1)]

The relevant statutory and regulatory provisions are set out in the appendix to this Petition.

STATEMENT

Congress has provided that aliens determined removable from the United States may file a motion to reconsider the order of removal and/or to reopen the removal proceedings, so that they may present new evidence or seek relief from error. This case involves Mr. Martin Rosillo-Puga, formerly a lawful resident of the United States, married for 16 years to a U.S. citizen, with two U.S. citizen children and deported due to a misdemeanor battery conviction. Shortly after his removal, the Seventh Circuit held that a conviction under the same Indiana battery statute pursuant to which Mr. Rosillo was convicted and removed, did not constitute an aggravated felony or a crime of violence as required to support an order of removal. See *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003).

While there is no geographic limitation on those aliens entitled to file a motion to reconsider removal or to reopen removal proceedings in the statutory text establishing these remedies, in this case the Tenth

Circuit held that such relief is unavailable to aliens once they have departed the United States. This issue has been widely litigated and has divided the numerous courts of appeals who have considered the validity of the regulatory departure bar. In this case, the Tenth Circuit flatly rejected the Fourth Circuit's contrary and well-reasoned opinion that Congress expressly and unambiguously guaranteed aliens the right to seek removal or reconsideration regardless of their location. Four other courts of appeals also have taken conflicting approaches to the question.

This is an issue of substantial practical importance. Under the current state of the law, an alien who follows the law and departs the United States after an unfavorable determination in removal proceedings would be unable to file a motion to reopen or reconsider in the First, Fifth, Sixth and Tenth Circuits, while aliens in the Fourth and Ninth Circuits would be able to seek such redress even after departing. More astonishing, however, is that under the current state of the law, an alien who defies an order of removal and remains in the country illegally is entitled to seek this relief in every Circuit.

By holding that aliens who follow the law and depart as required may not avail themselves of such relief, the Tenth Circuit departed from the governing statutory language, and frustrated the congressional purpose. To bring uniformity to the courts of appeals and eliminate a significant distortion of the immigration law, further review is warranted.

This petition is submitted in coordination with counsel for Petitioner Eddie Mendiola who will be filing a similar petition, from the same (Tenth) Circuit on or before May 28, 2010. For the Court's convenience and for the sake of judicial economy, counsel suggest that the Court consider these petitions together. These cases challenge the validity of different, but substantively identical regulations prohibiting the filing of motions to reopen removal proceedings or reconsider an order of removal by those aliens who have departed the United States. Both regulations suffer from the same defect – they are contrary to Congress' express intent to offer relief to any and all aliens who have had an adverse ruling on removability regardless of their geographic location when such motions are filed.

This petition differs from the Mendiola petition in that it also challenges the validity of the Tenth Circuit's alternative basis for denial of Mr. Rosillo's appeal – that his motion to reopen and/or reconsider was untimely. The Tenth Circuit exceeded the scope of its review authority, because the IJ's and BIA's orders clearly indicate that no procedural or substantive issues were considered at all. Rather, first the IJ and then the BIA determined that they had no jurisdiction to consider any substantive or procedural aspect of Mr. Rosillo's motion to reopen and/or reconsider solely because he had departed the country.

A. Statutory And Regulatory Background.

1. The government initiates removal proceedings against a noncitizen by filing a Notice to Appear with an Immigration Judge (IJ), specifying the grounds alleged for removal. 8 U.S.C. § 1229(a)(1). Aliens determined to be removable by an IJ may appeal their removal order to the BIA. The removal order becomes final upon review by the BIA (or upon expiration of the BIA review filing deadline). *Id.* § 1101(a)(47). At that point, the alien may seek judicial review of the removal order by filing a petition for review in the court of appeals for the circuit in which the removal hearing was conducted. *Id.* § 1252(a)(5).

An alien also may seek administrative review of an IJ's removal decision or of a final removal order by filing a motion to reopen or reconsider.[1] *Id.* § 1229a(c)(6)-(7). Motions to reopen give aliens a chance to challenge their removal by presenting new, material facts unavailable at their original removal proceedings. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). Motions to reconsider allow an alien to challenge

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[1] Such motions are filed directly with the IJ where the BIA does not take jurisdiction over the alien's case – for example, where an alien fails to appeal his removal order. Otherwise, they are properly filed with the BIA. See BIA Practice Manual App. K (Where to File a Motion).

mistakes of fact or law in the original administrative decision. *Id.* §§ 1003.2(b)(1), 1003.23(b)(2).[2]

The BIA has had the authority to entertain such motions since its creation. See 5 Fed. Reg. 3502, 3503-3504 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.9) (creating the BIA and providing that "[t]he reconsideration, reargument or reopening of a final decision by the Board of Immigration Appeals shall be permitted only upon motion."); see also 23 Fed. Reg. 9115, 9118 (1958) (final rule codified at 8 C.F.R. § 3.2 (1959)) (allowing the BIA to "reopen or reconsider any case in which it has rendered a decision" on its own motion or by written motion of a party). Until 1996, however, motions to reopen and reconsider removal orders were solely creatures of regulation. The governing regulations prevented the Board or an IJ from considering motions to reopen or reconsider filed "by or in behalf of a person who is the subject of deportation proceedings *subsequent to his departure from the United States.*" *Ibid.* (emphasis added). This regulatory post-departure bar mirrored the then-governing statutory limit on judicial review, which provided that "[a]n order of deportation or of

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[2] The regulations governing motions to reopen and reconsider were originally codified at 8 C.F.R. § 3.2. The regulations were re-codified in 2003 pursuant to the Homeland Security Act of 2002, as amended, which transferred the functions of the former Immigration and Naturalization Service to the Department of Homeland Security, while retaining the Executive Office of Immigration Review in the Department of Justice. 68 Fed. Reg. 9824, 9826 (Feb. 28, 2003).

exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after issuance of the order." 8 U.S.C. § 1105a(c) (1962). Until the repeal of this post-departure bar to federal court review in 1996, most aliens received an automatic stay of their removal order pending resolution of any appeals to prevent the court from being divested of jurisdiction by the alien's departure from the United States. See § 1105a(a)(3) (1994). Such a stay also preserved the alien's right to file a motion to reopen or reconsider an IJ or BIA decision.

2. What began as a regulatory privilege became a statutory right with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009. Among its many reforms, IIRIRA repealed the statutory prohibition on judicial review of removal orders when an alien has departed the country. IIRIRA also, for the first time, expressly provided aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation within 90 days of the entry of the final administrative order of removal. See 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); *id.* § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings. . . ."). The new statute does not include an express post-departure bar on the now statutorily-authorized motions to reopen (or reconsider) deportation proceedings before the IJ (or BIA).

When the Attorney General promulgated implementing regulations for IIRIRA in March 1997, however, she retained without change the pre-IIRIRA bar on post-departure motions to reopen and to reconsider. The current regulation, 8 C.F.R. § 1003.23(b)(1), which is substantially identical to the one in force before the enactment of IIRIRA, prohibits the IJ from considering motions to reopen removal proceedings filed by any alien who has departed the United States, either voluntarily or involuntarily. It reads:

> A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

A second regulation, 8 C.F.R. § 1003.2(d), contains virtually identical language governing motions to reopen or reconsider filed before the BIA.[3]

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[3] 8 C.F.R. § 1003.2(d) includes a post-departure bar for motions to reopen or reconsider filed with the Board of Immigration Appeals. It reads, in relevant part:

> (d) Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of

(Continued on following page)

B. Mr. Martin Rosillo-Puga.

Petitioner Mr. Martin Rosillo-Puga, a native and citizen of Mexico, married Chiara Rosillo, a United States citizen, in 1994. (R. 000030). On July 18, 1995, Mr. Rosillo became a conditional legal permanent resident of the United States after the filing by his wife of an immediate relative petition. (R. 000030; 000101). Mr. Rosillo and Chiara have now been married for sixteen (16) years and have two minor children who are also United States citizens, Alejandra and Martin, Jr. (R. 000030). During Mr. Rosillo's residency in the United States, he provided his family with necessary emotional, physical, and financial support. (R. 000030-31). Mr. Rosillo was gainfully employed as a landscaper and trained to be a heavy equipment operator. (R. 000030). Mr. Rosillo's wife, Chiara, suffers from a number of serious medical conditions, and depended on Mr. Rosillo's financial support to provide for their family. (R. 000031).

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exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

C. Removal Proceedings.

On August 14, 2003, the Department of Homeland Security commenced removal proceedings against Mr. Rosillo by filing a Notice to Appear before the Immigration Court. (R. 000101-02). Mr. Rosillo was unable to obtain counsel for the immigration court proceedings and appeared *pro se*. (R. 000030). Mr. Rosillo did not believe that he could challenge the charges alleged in the immigration proceedings. (*Id.*). On August 18, 2003, Mr. Rosillo was ordered removed from the United States to his native country of Mexico on the basis that his 1997 conviction for misdemeanor battery, pursuant to section 35-42-1 of the Indiana Code, constituted an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) and a removable offense under 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (E)(i). (R. 000099; 000101-02). Mr. Rosillo had no money to hire a lawyer to appeal the removal order and was subsequently removed. (R. 000030). He was physically removed to Mexico and resides in La Calera, a small village consisting of approximately 300 families. (*Id.*).

Three months after Mr. Rosillo's removal, the Seventh Circuit held that a conviction under the same Indiana battery statute pursuant to which Mr. Rosillo was convicted, did not constitute an aggravated felony or a crime of violence which subjected Mr. Rosillo to removal. See *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). Mr. Rosillo, as noted, did not have counsel during his removal proceedings or immediately after his removal, and was thus unaware

that his removal order was based on an erroneous interpretation of statutory language. (See R. 000030-31). Moreover, his home in the small Mexican village of La Calera did not have a telephone or computer by which Mr. Rosillo could have discovered the error. (R. 000030). And, Mr. Rosillo did not have access to any other sources of information about legal developments in the United States. (R. 000030-31). He discovered that his conviction was based on the erroneous interpretation of section 35-42-2-1 only after his wife found volunteer lawyers to assist Mr. Rosillo at the Post-Deportation Human Rights Project at Boston College Law School. (R. 000031). Upon learning of the error and with the assistance of counsel for the first time, Mr. Rosillo promptly initiated proceedings to reconsider or reopen his removal proceedings. (R. 000068-98).

D. Motion To Reconsider Or Reopen Removal Proceedings And Appeal To BIA.

On May 7, 2007, with the assistance of counsel, Mr. Rosillo filed a Motion To Reconsider or Reopen Proceedings before the Immigration Judge on the ground that his battery conviction is not a crime of violence under 18 U.S.C. § 16, and therefore not a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i) nor an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii). (R. 000063-000070). Because Mr. Rosillo did not discover the error in law prior to the 90-day limitation for filing a motion to reopen, Mr. Rosillo requested that the IJ exercise *sua*

sponte jurisdiction under 8 C.F.R. § 1003.23(b)(1) to reopen or reconsider the removal order based upon the exceptional circumstance of a change in the law. (R. 000071-74). Pursuant to 8 C.F.R. § 1003.23(b), the IJ "may upon his or her own motion *at any time*, or upon motion of . . . the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals."

In an opinion dated May 24, 2007, the IJ explained that in most circumstances he had general discretion to reopen and reconsider proceedings pursuant to 8 C.F.R. § 1003.23(b)(1). (R. 000054). However, the IJ concluded that he was constrained from exercising his general discretion to reopen and reconsider proceedings due to the regulatory post-departure bar, 8 C.F.R. § 1003.23(b)(1). (*Id.*). The IJ denied Mr. Rosillo's motion to reopen or reconsider on the sole ground that the post-departure bar precluded the exercise of his *sua sponte* jurisdiction. (R. 000054).

Mr. Rosillo subsequently appealed the IJ's decision to the Board of Immigration Appeals. (R. 000011). Mr. Rosillo argued that the regulatory post-departure bar did not preclude the IJ from exercising his *sua sponte* jurisdiction to reopen or reconsider his removal proceedings because the regulatory post-departure bar in 8 C.F.R. § 1003.23(b)(1) is contrary to the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1229a(c)(6), which codifies the right to file a motion to reopen *without*

imposing any post-departure bar. (R. 000020). The BIA, however, affirmed the IJ's order on the same ground. (R. 000002). The BIA concluded that the regulatory post-departure bar in C.F.R. § 1003.23(b)(1) precluded the IJ from exercising jurisdiction over a motion to reopen after the alien departs from the United States. (R. 000002).

E. Tenth Circuit Decision.

Mr. Rosillo petitioned the Tenth Circuit to reverse the BIA decision. Mr. Rosillo argued that the IJ was not precluded from exercising his discretion to reopen or reconsider under 8 C.F.R. § 1003.23(b)(1), because the regulation is an invalid exercise of the Attorney General's authority. The regulation directly conflicts with the express language of 8 U.S.C. §§ 1229a(c)(6)(A) and (7)(A), which grant aliens the right to file one motion to reconsider and one motion to reopen proceedings irrespective of the alien's geographic location. A divided Court of Appeals affirmed the BIA's ruling on the applicability of the post-departure bar and denied Mr. Rosillo's petition for review. App., *infra*, 21, 31.

The court recognized that the Fourth Circuit concluded that 8 U.S.C. § 1229(a)(7)(A) "clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed." *Id.* at 14 (quoting *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007)). The court, however, declined to follow

the *William* majority, and instead relied on the lone dissent in *William*, upholding the regulatory post-departure bar as valid under the statutes in question. As an alternative basis for denial of the petition for review, the Tenth Circuit held that Mr. Rosillo's petition was untimely. *Id.* at 24-25. The Tenth Circuit denied the petition on the ground of timeliness despite the fact that neither the IJ nor the BIA articulated timeliness as a basis for denial in their orders.

REASONS FOR GRANTING THE PETITION

As this case demonstrates, the availability of a motion to reopen or reconsider is a matter of more than theoretical or technical importance. As is the case here, such a motion may be the only avenue for relief from the erroneous removal of an alien (here, a long-time resident) from the United States. Congress accordingly guaranteed aliens the right to make such motions, whether or not they have already departed the United States; that guarantee was an essential component of Congress' decision also to expedite the removal of certain aliens from the country. The Tenth Circuit's decision in this case, upholding a decision that bars aliens from filing such motions after their departure, cannot be reconciled with the statutory language and congressional purpose. Because that decision also cements an acknowledged conflict in the circuits, further review is in order.

I. The Courts Of Appeals Are Divided Over The Validity Of 8 C.F.R. § 1003.23(b) And The Companion Regulation, 8 C.F.R. § 1003.2(d).

To begin with, there is a clear and acknowledged conflict between the Fourth and Tenth Circuits (both of which were themselves divided) over the question that this case presents – whether the regulatory post-departure bar on motions to reopen or reconsider before the BIA or an IJ is consistent with the controlling statute. But that is not the full extent of the confusion: four additional circuits have considered the treatment of post-departure motions to reopen or reconsider and have taken widely divergent approaches. As a result, identically situated persons face different rules regarding post-departure motions to reopen or reconsider in different parts of the country. Because uniformity in this area of the law is essential, further review is warranted for this reason alone.

1. As the Tenth Circuit panel in this case acknowledged, a divided Fourth Circuit panel has held the regulation invalid under IIRIRA because "§ 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country." *William*, 499 F.3d at 332. The *William* majority explained that the statutory language "speak[s] to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (*i.e.* 'alien[s]') which it vests with the right to

file these motions." *Ibid.* It also reasoned that "the fact that Congress provided for [other] specific limitations on the right to file a motion to reopen bolsters the conclusion that § 1229a(c)(7)(A) cannot be read to except from its terms those aliens who have departed the country." *Id.* at 333. And the *William* majority noted that Congress did include a physical presence requirement in a different subsection of the statute dealing with aliens who apply for relief from removal as victims of domestic violence (*ibid.*), concluding that it "must draw a 'negative inference' from Congress' exclusion of the physical presence requirement from [§ 1229a(c)(7)(A)]." *Ibid.* The *William* decision speaks directly to the question presented in this case, and, insofar as is relevant here, William and petitioner are identically situated.

On the other hand, the Tenth Circuit expressly rejected the Fourth Circuit's conclusion. The majority "agree[d] with the [*William*] dissent's position and conclude[d] that 8 C.F.R. § 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally delegated rulemaking authority, and does not contravene 8 U.S.C. §§ 1229a(c)(6)(A) or (7)(A)." App., *infra*, 21. The majority believed that "the statute is simply silent on the issue of whether it meant to repeal the post-departure bars" and that "the agency's answer is based on a permissible construction of the statute." *Id.* at 21. In his lengthy dissent, Judge Lucero agreed with the *William* majority that "the pertinent provisions of § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee every alien the right

to file one motion to reconsider removability and one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States." *Id.* at 35.

The Tenth Circuit expressly rejected the Fourth Circuit's conclusion and held the regulation valid, not only in the present case but also in *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009) and *Silerio-Nunez v. Holder*, No. 08-9556, 2009 WL 4755726 (10th Cir. Dec. 14, 2009).[4] The Tenth Circuit panels in *Mendiola* and *Silerio-Nunez*, bound by the decision in this case, held that the regulation is valid under IIRIRA. See *Silerio-Nunez*, 2009 WL 4755726, at *2, *Mendiola*, 585 F.3d at 1310.

There is no denying this conflict. It has been repeatedly acknowledged by the Tenth Circuit and noted by the Ninth. See *Coyt v. Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) ("Those circuits are split. The Fourth Circuit has invalidated 8 C.F.R. § 1003.2(d) in its entirety. The Tenth Circuit upheld both [8 C.F.R. § 1003.2(d) and § 1003.23(b)(1)].") (internal citations omitted).

2. While their analyses differ in some particulars from those of the Fourth and Tenth Circuits, four additional courts of appeals also have considered

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[4] Like this case, *Silerio-Nunez* addresses 8 C.F.R. § 1003.23(b)(1)'s post-departure bar to review by an IJ. *William* and *Mendiola* discuss the issue in the context of 8 C.F.R. § 1003.2(d)'s post-departure bar to review by the BIA.

the treatment of post-departure motions to reopen or reconsider and have adopted widely divergent rules.[5] Like the Tenth Circuit, the First, Fifth, and Sixth Circuits have held, even after the enactment of IIRIRA, that 8 C.F.R. § 1003.2(d) and § 1003.23(b)(1) bar review of post-departure motions to reopen or reconsider. In contrast, the Ninth Circuit, like the Fourth, has held that an alien may file a motion to reopen or reconsider after departing the United States, unless the alien departs *while* he or she is the subject of removal proceedings. Therefore, an individual identically situated to petitioner may file a motion to reopen or reconsider in the Fourth and Ninth Circuits but not in the First, Fifth, Sixth, and Tenth.

Both the Fifth and Sixth Circuits have enforced the regulatory post-departure bar, post-IIRIRA. In *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003), the Fifth Circuit applied the regulation without mentioning IIRIRA. The court subsequently declined to comment on the merits of *William* because it declared itself bound by its decision. *Castillo-Perales v. Mukasey*, 298 F. App'x 366, 369 (5th Cir. 2008).[6]

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[5] The Seventh Circuit has noted but declined to reach the question of whether the regulatory post-departure bar remains valid under IIRIRA. See *Munoz De Real v. Holder*, 595 F.3d 747, 749 (7th Cir. 2010).

[6] In *Ovalles v. Holder*, 577 F.3d 288, 295 (5th Cir. 2009), the Fifth Circuit did not reach the question of whether IIRIRA precludes the regulatory post-departure bar to review of motions to reopen or reconsider because petitioner did not file his motion to reopen within the statutory deadline.

Similarly, without considering any IIRIRA-related arguments, the Sixth Circuit has stated that the regulation precludes an alien from reopening his or her removal proceedings once the alien has left the country. See *Mansour v. Gonzales*, 470 F.3d 1194, 1198 (6th Cir. 2006).

The First Circuit likewise has held that 8 C.F.R. § 1003.23(b)(1)'s post-departure bar is valid notwithstanding the enactment of IIRIRA, specifically concluding that the regulation had not been displaced by IIRIRA's repeal of 8 U.S.C. § 1105a(c), which read: "An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order." See *Pena-Muriel v. Gonzales*, 489 F.3d 438, 441-442 (1st Cir. 2007). Petitioner thus would not be able to reopen his removal proceedings under the First Circuit rule.

The Ninth Circuit, on the other hand, has held that an alien *may* file a motion to reopen or reconsider even after being deported because the post-departure bar "is phrased in the present tense and so by its terms applies only to a person who departs the United States while he or she 'is the subject of removal . . . proceedings.'" *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007). Because petitioner departed the United States only after his removal proceedings were completed, the Ninth Circuit would find that the regulatory post-departure bar does not apply to him and that he is therefore able to reopen his removal proceedings.

The upshot of these conflicting approaches is intolerable inconsistency: An alien in precisely the same circumstances as petitioner would have been permitted to seek relief in the Fourth and Ninth Circuits, but not in the First, Fifth, Sixth, and Tenth. This Court's intervention to clarify the law accordingly is essential.

II. The Issue Presented Here Is A Recurring One Of Substantial Practical Importance.

This conflict involves an issue of significant practical importance. Deportation is a severe penalty. *Padilla v. Kentucky*, ___ S. Ct. ___, 2010 WL 1222274, at *6 (March 31, 2010). As this Court recently acknowledged, "[t]he motion to reopen is an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings." *Nken v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317-2319 (2008)) (internal citations omitted). For a significant number of aliens, however, access to this crucial statutory right, as well as the right to file a motion to reconsider, depends solely on the geography of their appeal: The current conflict implicates six circuits that together handled over 62% of BIA appeals filed in 2009. Administrative Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts 94 tbl.B-3 (2009). Furthermore, the split stems, in part, from disagreement over the meaning of this Court's recent treatment of the motions to reopen in *Dada v.*

Mukasey, 128 S. Ct. 2307 (2008), which requires this Court's resolution.

A. The Practical Importance Of Motions To Reopen And Reconsider Counsels In Favor Of Review.

The practical importance of the statutory right itself counsels in favor of review. Motions to reopen and reconsider are a vital safeguard in a system that has been modified both to establish procedures leading to swift removal of aliens and to reduce the avenues for discretionary relief from removal. The 1990s saw a range of statutory and administrative changes to the immigration system that greatly expanded the number of aliens eligible for removal, largely by expanding the definition of aggravated felony to include a wider variety of crimes. "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses" and "the 'drastic measure' of deportation or removal . . . is now virtually inevitable for a vast number of non-citizens convicted of crimes." *Padilla*, 2010 WL 1222274, at *4. See also, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harvard Law Review 1890-1935 (2000); Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. Crim. L. &

Criminology 287, 295-296 (2009); see also Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. on Reg. 47, 66-67 (2010). This is particularly so given the complexity of immigration procedures and the lack of access to legal counsel during immigration proceedings. See *Ardestani v. INS*, 502 U.S. 129, 112 S. Ct. 515 (1991); *Escobar Ruiz v. INS*, 838 F.2d 1020, 1026 (9th Cir. 1988) ("deportation hearings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel.").

Yet, as more aliens became subject to removal, the system increasingly denies them access to discretionary relief. IIRIRA, for example, amended the INA to eliminate § 212(c) waivers of removal – a form of discretionary relief in which a court considered a range of equitable factors counseling against removal – replacing it with a more limited form of relief explicitly denied to aggravated felons. *I.N.S. v. St. Cyr*, 533 U.S. 289, 294-97 (2001).

These changes have led to the removal of ever-increasing numbers of aliens.[7] The number of noncitizens

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[7] The increasing rate at which immigrants are being deported has incited some harsh criticism for the immigration adjudication system both from the bench and the immigration bar. In a 2005 opinion, Judge Richard Posner opined that the state of the immigration adjudication system "ha[d] fallen below the minimum standards of legal justice[.]" *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Courts of appeal and commentators alike have complained of overburdened, biased,

(Continued on following page)

facing removal orders increased dramatically with the enactment of IIRIRA, rising over 64% from 1996 to 1997 – twice as much as it had in any of the previous five years. Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2008, at 95 tbl.36 (2009). Since 1997, that number has grown three-fold, with 358,886 aliens removed in 2008 alone (the latest year for which statistics are available). *Ibid.*

But resolution of these cases is not immune from error, due particularly to the BIA's increased use of summary procedures to deal with its "staggering" case backlog. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 23 & 29-31 (2005). Under the current rules, a majority of cases have been referred to a single Board member for review (instead of a panel) and Board members are permitted to

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and unprofessional IJs and poor legal analysis in immigration decisions. See, *e.g.*, *Wang v. Att'y General of U.S.*, 423 F.3d 260, 270 (3d Cir. 2005) (deeming an IJ opinion to be "highly improper" due to its contemptuous tone and the IJ's reliance on consideration of personal issues irrelevant to the merits of the claim); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595, 598-610 (noting high IJ caseloads, lack of resources, politicized hiring, and subpar work product). See also Jaya Ramji-Nogales et al., *Refuge Roulette: Disparities in Asylum Adjudication*, 60 Stan. Law. R. 295 (2007) (documenting inconsistencies in asylum grant rates across immigration judges).

summarily dispose of cases without basis in law or fact without issuing an opinion. 64 Fed. Reg. 56135 (Oct. 18, 1999) (establishing streamlined procedure); 67 Fed. Reg. 54878 (Aug. 26, 2002) (expanding the procedures to be the "dominant method of adjudication for the large majority of cases before the Board").

The "alarming frequency" of ineffective assistance of counsel in the immigration context, (*Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008)), as well as the lack of access to counsel for many aliens subject to removal proceedings, is another major source of error. Noncitizens without access to counsel, particularly those deported to their home countries, often have little access to information about legal developments in the United States making it impossible to challenge deportation orders by filing a *timely* motion to reopen deportation proceedings. Accordingly, the IJ and BIA's authority to *sua sponte* reopen immigration proceedings is often the only vehicle by which a noncitizen can seek review of the "drastic" penalty of deportation. Indeed, the bright line post-departure bar enacted by the agency also raises serious due process concerns. *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Boumediene v. Bush*, 553 U.S. 723 (2008).

Courts and federal agencies have long held a "full panoply of powers which they may invoke *sua sponte*." *Wang v. Ashcroft*, 260 F.3d 448, 453 (5th Cir. 2001) (recognizing the power of BIA to act *sua sponte* to reopen immigration proceedings). In this context, the IJ is authorized "upon his or her own motion *at any time*, or upon motion of the Service or the alien,

[to] reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." 8 C.F.R. § 1003.23. Similarly, the BIA may also "at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2. The IJ and BIA's *sua sponte* authority to reopen immigration proceedings is consistent with the broad discretion granted the agencies to grant or deny motions to reopen. *Kucana v. Holder*, 130 S. Ct. 877, 838 (2010) (noting discretion conferred by the Attorney General to consider motions to reopen).

The IJ and BIA's *sua sponte* authority is essential because exceptional situations occasionally arise after entry of an order of removal that undermine the very basis of the removal. See *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 (5th Cir. 2008); *In re G-D*, 22 I&N Dec. 1132 (BIA 1999). To be sure, exceptional situations are rare. The IJ and BIA exercise their *sua sponte* authority "sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). However, there are occasions where a significant change in the law may undermine the basis of removal such that the removal might never have occurred in the face of the change. See *In re G-D*, 22 I&N Dec. at 1135. But, rarely do such changes in the law occur within the 90-day limitation period to reopen immigration proceedings. See, *e.g.*, *In re GCL*, 23 I&N Dec. 359 (BIA 2002)

(reopening asylum proceedings finalized in 1995 after 1996 change in law regarding the definition of a refugee); *In re XGW*, 22 I&N Dec. 71 (BIA 1998) (reopening asylum proceedings after change in the law that occurred four months after the denial of application for asylum). Or, rarely are noncitizens who are often without access to legal counsel, aware of such significant legal developments. Consequently, the IJ and BIA's *sua sponte* authority to reopen serves the interest of justice by providing often the only remedy for noncitizens seeking review of deportation orders subject to new changes in the law.

In this context, motions to reopen and reconsider serve a necessary and important checking function on removal proceedings. They are, in many situations, an alien's only practical option for vindicating his or her due process rights, raising previously unavailable evidence or a change in the law that directly bears upon – or may completely preclude – his removal, or correcting the mistakes of an ineffective attorney or mistaken immigration judge.[8]

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[8] Over 12,000 such motions were filed with immigration judges in 2008. Office of Planning, Analysis & Technology, Executive Office for Immigration Review, FY 2009 Statistical Yearbook at B7 fig.2 (March 2009). In the same year, the BIA received 7,823 motions to reopen (not including IJ appeals). *Id.* at T2 tbl.16.

B. Court Of Appeals Confusion Over *Dada v. Mukasey* Requires Resolution By This Court.

Apart from the practical importance of the statutory right at stake, the specific question of whether the post-departure bar is valid requires this Court's resolution because it stems, in part, from inconsistent interpretations of this Court's recent decision in *Dada v. Mukasey,* 128 S. Ct. 2307 (2008). In *Dada*, the Court affirmed the statutory right to pursue a motion to reopen and held that, in order to "safeguard" that right, an alien must be permitted to withdraw a request for voluntary departure that, if granted, would trigger the §§ 1003.23(b)(1) and 1003.2(d) departure bars and preclude decision of the motion. 128 S. Ct. at 2319. (The question of the validity of the post-departure bar was not before the Court. *Id.* at 2320.)

Although the Fourth Circuit's *William* decision predates *Dada*, the panel majority in the present case, which relies on the *William* dissent, cites *Dada* for support. The majority relies on *Dada* for the proposition that "[t]he very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here – the alien's motion to reopen would not be withdrawn but for the regulation," App., *infra,* 12, n. 3, although the majority conceded that "neither party in *Dada* specifically challenged the validity of the regulations at issue," *id.* at 13, n. 3. The dissent, in sharp contrast, believed that *Dada* "all but compels the

conclusion" that IIRIRA trumps the departure bar because *Dada* recognized that "an alien *must* be allowed to file one motion to reopen" and "an alien cannot be forced by regulation to forfeit a motion guaranteed by statute." *Id.* at 51-52 (Lucero, J., dissenting). This Court should take this opportunity to resolve this substantial divergence of interpretation.

Congress and the Attorney General have had over a decade to address the discrepancy between the unequivocal statutory rights granted by IIRIRA and the post-departure bar in § 1003.23(b)(1). They have failed to do so, leaving the courts of appeals with no guidance and leading to the current intractable conflict. The issue presented in this case is likely to arise in many future IJ proceedings and involves an important source of administrative review in a system where it is sorely needed. The Court's guidance is therefore necessary to bring the statutory and regulatory treatment of these motions into alignment.

III. The Tenth Circuit's Decision Was Wrong.

The need for review is especially acute here because the Tenth Circuit's decision below is wrong. The plain language and structure of IIRIRA show that Congress meant to displace the departure bar, and this interpretation is consistent with the broader congressional purpose. The evolution of immigration law has decoupled physical presence from jurisdiction, making an alien's physical presence increasingly

irrelevant to the jurisdiction of the court reviewing his or her case. The departure bar is a holdover that Congress intended to be set aside. The logic of the current system of judicial review compels this conclusion.

A. The Statutory Language Is Plain And Unambiguous.

Congress provided in 8 U.S.C. § 1229a(c)(7)(A) that "*[a]n alien* may file one motion to reopen any proceeding[] under this section." Similarly, § 1229a(c)(6)(A) provides "*[t]he alien* may file one motion to reconsider . . . " (emphasis added). The language of these provisions is plain and unequivocal: there is no exception for aliens who have departed the United States. "We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there'" (*Dodd v. United States*, 545 U.S. 343, 357 (2005) ((alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992))); all aliens, regardless of location, are treated alike and have a right to file a motion to reopen. See App., *infra*, 35 (Lucero, J., dissenting) ("A plain reading of 8 U.S.C. §§ 1229a(c)(6)(A) and (7)(A) comfortably occupies all the space on the issue before us and leaves any potential for valid promulgation of the challenged portion of 8 C.F.R. § 1003.23(b)(1) outside in the bitter cold."); *William*, 499 F.3d at 332 ("We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.");

Azarte v. Ashcroft, 394 F.3d 1278, 1285-86 (9th Cir. 2005) ("With respect to motions to reopen . . . , Congress' language in IIRIRA is clear and unambiguous."). The Attorney General may not rewrite an Act of Congress by regulating the exclusion of a subclass of aliens that Congress unambiguously intended to reach. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

B. The Structure Of The Statute Confirms Congress' Intent For The Reach Of §§ 1229a(c)(6)(A) And 7(A) To Be Sufficiently Broad To Include Departed Aliens.

A review of the statute as a whole indicates that had Congress intended to exclude such a significant class of aliens from relief prescribed by 8 U.S.C. §§ 1229a(6)(A) and 7(A), it most certainly would have said so.

Indeed, another subsection of 8 U.S.C. § 1229a distinguishes between aliens within and without the United States, providing that the usual 90-day time limit for a motion to reopen does not apply to a battered spouse, child, or parent who "is physically present in the United States at the time of filing the motion." § 1229a(c)(7)(C)(iv)(IV). Congress therefore plainly knew how to limit certain forms of relief to aliens currently in the United States, and it chose not to impose such a limit in §§ 1229a(c)(6)(A) and (7)(A). If physical presence in the United States were

required for *any* alien to file a motion to reopen, the language in § 1229a(c)(7)(iv)(IV) requiring specified aliens to be "physically present" would be superfluous.[9]

The statute also includes several express limitations on motions to reopen, including those on timeliness, §§ 1229a(c)(6)(B), (7)(C), content, §§ 1229a(c)(6)(C), (7)(B), and numerosity, §§ 1229a(c)(6)(A), (7)(A). But § 1229a includes no limitation on geography. When Congress makes the scope of its intention clear through limitations and exceptions, the lack of other limitations and exceptions should be read to indicate Congress' decision *not* to include those limitations and exceptions. *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). Thus, it is properly inferred that Congress intentionally eschewed a geographical limitation on aliens filing motions to reopen.

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[9] Adopting the reasoning of the *William* dissent, the majority in the present case opined that § 1299a(c)(7)(C)(iv)(IV)'s physical-presence requirement was not added until 2006 and is therefore unhelpful in discerning what Congress intended when it enacted IIRIRA in 1996. App., *infra*, 17, 21. But if the majority's reading were correct – if there is a physical presence requirement implicit in §§ 1229a(c)(6)(A) and (7)(A), adding the physical-presence language in 2006 would have been unnecessary. That language presumably was added *because* §§ 1229a(c)(6)(A) and (7)(A) had no such requirement. *Id.* at 1165-66.

C. Legislative History Confirms Congress' Intent To Include Even Those Aliens Who Have Departed.

The legislative background of IIRIRA supports the conclusion that Congress meant what it said – any alien who has been determined removable may file a motion to reopen or reconsider. Congress expressly intended IIRIRA "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Needless to say, allowing aliens to file motions *after they have been removed* is fully consistent with – and may even facilitate – this goal. One of Congress' primary concerns in enacting IIRIRA was the amount of time it took to deport aliens who had committed crimes.[10]

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[10] See *Members' Forum on Immigration: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary,* 104th Cong. 38 (1995) (statement of Rep. Susan Molinari) ("The criminal alien population, which has an extremely high rate of recidivism, can be curbed by simply improving deportation procedures, thus saving our local communities millions of dollars by providing them with much more safety. It also frees up desperately needed jail space."); *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary,* 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) ("The administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens."); *Proposals for Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the*

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This concern with efficient removal, however, is a "non-sequitur" with respect to allowing aliens *already outside of the country* to file motions to reopen and reconsider. See App., *infra,* 48-49 (Lucero, J., dissenting). As these aliens have already left the country prior to filing, there is no danger that they will use motions to reopen or reconsider as a "means of delaying removal." *Id.* at 49. Indeed, if these filings were barred, Congress would be creating a disincentive for aliens to leave the country, leading them to withdraw motions for voluntary departure or to refuse to comply with removal orders, adding to the original problem. See *Dada*, 128 S. Ct. at 2320.

Nor would allowing post-departure motions result in an unmanageable increase in filings. IIRIRA still "limits in significant ways the availability of the motion to reopen," *Dada*, 128 S. Ct. at 2316, most importantly through filing deadlines and numerical limits. These procedural limits greatly restrict the number of aliens eligible to file such motions, absent grounds (such as exceptional circumstances or ineffective assistance of counsel) for equitable tolling or *sua sponte* reopening or reconsideration. Moreover, as this Court has repeatedly recognized, the immigration authorities retain considerable discretion over

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Judiciary, 103rd Cong. 40 (1994) (statement of Barbara Jordan, Chair, Comm'n on Immigration Reform) ("The top priority of interior enforcement strategies should be the removal of deportable criminal aliens from the U.S. in such a way that the potential for their return to the U.S. will be minimized.").

whether to grant a motion to reopen or reconsider. See, *e.g.*, *INS v. Abudu*, 484 U.S. 94 (1988). The BIA's streamlined summary procedures allow the Board to easily dispose of facially invalid or frivolous motions. And, of course, "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done." *In re S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997).

Congress created the statutory right to seek reopening or reconsideration as part of a comprehensive revision of the law governing when an alien's physical location should (or should not) bear on the judicial review of his or her immigration status. Pre-IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States (8 U.S.C. § 1105a(c) (1994)), and so most aliens were able to obtain an automatic stay of their removal order while judicial review was pending. *Id.* § 1105a(a)(3). Interested in more efficient removal, Congress in IIRIRA rendered aliens' location irrelevant to the jurisdiction of reviewing courts. Among other things, IIRIRA lifted a statutory bar to judicial review of deportation orders for aliens who had departed the country. See *William*, 499 F.3d at 330. The statutory right to move to reopen regardless of location is a piece of that reform. (The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, was the next major piece of legislation to address removal procedures; it took a further step in the same

direction by repealing jurisdictional obstacles for aliens pursuing petitions for review after they depart. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005)).

Having made these changes, Congress also repealed the presumption of an automatic stay of removal pending completion of judicial review and restricted the availability of injunctive relief to preclude removal. See *Nken v. Holder*, 129 S. Ct. 1749, 1755-56 (2009). Under this decoupling of jurisdiction and physical presence in the United States, the post-departure bar on motions to reopen or reconsider is a relic from a bygone era. It should not survive Congress' substantial revision of immigration law.

IV. The Tenth Circuit's Alternative Basis For Denying The Petition Is Erroneous.

The Tenth Circuit panel majority, over the strong dissent of Judge Lucero, denied Mr. Rosillo's petition for review on the alternative ground that the petition was untimely. Despite Mr. Rosillo's express preservation of his right to request the IJ and BIA to reopen *sua sponte* his removal proceedings in briefs filed with the IJ and BIA, the Tenth Circuit completely ignored the IJ and BIA's discretionary powers to reopen Mr. Rosillo's removal proceedings based on exceptional circumstances. Instead, the Tenth Circuit denied Mr. Rosillo's petition on a ground that the IJ and the BIA never considered – timeliness. Significantly, neither the IJ nor the BIA based their

dismissal of Mr. Rosillo's motion on timeliness. Rather, the IJ and BIA's denial of Mr. Rosillo's petition was entirely based on the departure bar. App. at 64 & 59, respectively. And, the Tenth Circuit's consideration of factors outside the scope of the IJ and BIA's conclusions of law is erroneous.

Judge Lucero's dissent aptly describes the fundamental rule of administrative law. A reviewing court may not uphold an agency decision based on reasons not articulated by the agency itself in its decision. *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S. Ct. 2314, 2326 (1974); *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459 (1943). Nor may reviewing courts search the record to find alternative grounds to support an agency decision. *Mayo v. Schiltgen*, 921 F.2d 177 (8th Cir. 1990). "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Id.* at 88, 63 S. Ct. at 460. This is so because appellate courts simply "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.*

The Tenth Circuit exceeded its authority when it decided that Mr. Rosillo's motion to reopen was due to be denied because it was untimely. Only after the IJ and BIA have opined on the timeliness of Mr. Rosillo's motion to reopen, may the Tenth Circuit review their decisions. If the Tenth Circuit's opinion remains valid, the opinion will effectively neutralize the IJ and the

BIA's *sua sponte* authority in the Tenth Circuit and effectively overrule *Chenery*. This power is simply too important to allow the Tenth Circuit to render it meaningless in light of the severity of the penalty of deportation, the complexity of deportation proceedings, and the lack of other avenues of redress for exceptional situations such as we have here – where changes in law that would render removal invalid in the first instance have developed subsequent to the removal proceedings.

In light of the foregoing, this Court should grant review and reverse the Tenth Circuit's erroneous decision denying Mr. Rosillo's petition for review on the basis of timeliness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARTIN ROSILLO-PUGA, a/k/a Martin Puga, a/k/a Martin Rosillo,

Petitioner,

v.

ERIC H. HOLDER, JR.,* United States Attorney General,

Respondent.

- -

THE AMERICAN IMMIGRATION LAW FOUNDATION,

Amicus Curiae.

No. 07-9564

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

(Filed Sep. 15, 2009)

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* Pursuant to Fed. R. App. P. 43(c)(2), Eric H. Holder, Jr. is substituted for Michael B. Mukasey as the respondent in this appeal.

Cynthia G. Burnside, Holland & Knight LLP, Atlanta, Georgia (Laurie Webb Daniel, Kimberly R. Ward, Holland & Knight LLP, Atlanta, Georgia, and Rachel E. Rosenbloom, Post-Deportation Human Rights Project Center for Human Rights and International Justice, Boston College, Newton, Massachusetts, with her on the briefs) for Petitioner.

James A. Hurley, Attorney (Anh-Thu P. Mai, Senior Litigation Counsel, with him on the brief), United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

Trina Realmuto and Beth Werlin, Washington, D.C., filed an amicus curiae brief on behalf of the American Immigration Law Foundation.

Before **LUCERO**, **ANDERSON**, and **O'BRIEN**, Circuit Judges.

ANDERSON, Circuit Judge.

Petitioner Martin Rosillo-Puga seeks review of a decision issued by the Board of Immigration Appeals ("BIA"), in which the BIA affirmed the Immigration Judge's ("IJ") denial of Rosillo-Puga's motion to reconsider or reopen his deportation proceedings. The IJ, in reliance on regulations implementing the Immigration and Nationalization Act, had ruled that he lacked jurisdiction over the motion because Rosillo-Puga had

previously been removed from the United States. After concluding that the regulations are valid, we deny Rosillo-Puga's petition for review.

BACKGROUND

On July 18, 1995, Rosilla-Puga, a native and citizen of Mexico, was admitted into the United States in Indiana as a conditional resident. On July 24, 1997, he was convicted of battery in an Indiana state court. On August 14, 2003, the Department of Homeland Security ("DHS") commenced removal proceedings against Rosillo-Puga by filing a Notice to Appear ("NA") before the immigration court in Aurora, Colorado. DHS charged Rosillo-Puga as being removable from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), because he had been convicted of an aggravated felony (the 1997 battery conviction), as well as removable pursuant to 8 U.S.C. § 1227(a)(2)(E)(I), because he had been convicted of a crime of domestic violence (the same battery conviction, which involved Rosillo-Puga's wife).

Rosillo-Puga appeared *pro se* at a hearing before an IJ and admitted the factual allegations in the NA. Based upon those admissions, the IJ ordered Rosillo-Puga removed to Mexico. Rosillo-Puga did not apply for relief from removal and he waived his right to appeal the removal order. Later in 2003, he was removed to Mexico. Three months following Rosillo-Puga's removal to Mexico, the Seventh Circuit held that a conviction for battery under Indiana law,

pursuant to which Rosillo-Puga had been convicted, was not an aggravated felony or a crime of domestic violence for immigration law purposes. *Flores v. Ashcroft,* 350 F.3d 666 (7th Cir.2003).

On May 7, 2007, some three-and-one-half years after his removal to Mexico, Rosillo-Puga filed a "Motion to Reconsider and Rescind Removal Order, or in the Alternative to Reopen Proceedings" with the immigration court in Colorado. In his motion, Rosillo-Puga argued that, pursuant to 8 C.F.R. § 1003.23(b)(1), the immigration court could reconsider or reopen his case "at any time" and that the IJ had discretion to do so *sua sponte.*[1] Rosillo-Puga specifically contended that the August 2003 decision to remove him was "based on an error of law" because the Seventh Circuit had subsequently clarified that his battery conviction was not an aggravated felony or a crime of violence which subjected Rosillo-Puga to removal. Respondent's Mot. at 1, Admin. R. at 63. Rosillo-Puga further argued that the *Flores* decision constituted "exceptional circumstances to invoke the Court's *sua sponte* jurisdiction." *Id.* at 9.

8 C.F.R. § 1003.23(b)(1) contains another provision critical to our decision in this case:

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[1] 8 C.F.R. § 1003.23(b)(1) provides in pertinent part:

> An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision. . . .

> A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.23(b)(1). Thus, pursuant to this regulatory provision's post-departure bar, aliens like Rosillo-Puga who have been removed from the United States may not file a motion to reopen or reconsider their removal proceeding. In his motion to reopen or reconsider, Rosillo-Puga argued that, despite the fact that he had departed the United States, the regulation's "at any time" language "permits an Immigration Judge to exercise *sua sponte* jurisdiction regardless of whether the motion is made pre- or post-departure." Respondent's Motion at 11, Admin. R. at 73. He also argued that his removal to Mexico did not bar his motion to reopen because the deportation bar of 8 C.F.R. § 1003.23(b)(1) "does not apply to those who have already been removed and are therefore no longer 'the subject of removal proceedings.'" *Id.* at 11-12. Finally, Rosillo-Puga argued that, because of the "at any time" language in § 1003.23(b)(1), the time limits contained in the statute for motions to reconsider (within thirty days

of the entry of the final order of removal) and motions to reopen (within ninety days of the entry of the final order of removal) did not bar his motion.

The IJ denied Rosillo-Puga's motion. While noting that "[i]n most circumstances, an IJ has general discretion to reopen and reconsider proceedings," the IJ concluded that the post-departure bar specifically "precludes the IJ to exercise his general discretion in reopening and reconsidering proceedings under such circumstances." Mem. and Dec. at 2, Admin. R. at 54. Citing *Shawnee Tribe v. United States*, 423 F.3d 1204, 1213 (10th Cir. 2005), the IJ held that "the general *sua sponte* authority given to an IJ to reopen and reconsider proceedings is limited by the more specific prohibition on making such motions on behalf of a person who has departed after an order of removal." *Id.*[2] The IJ accordingly denied Rosillo-Puga's motions to reconsider or reopen the proceedings.

Rosillo-Puga appealed the adverse decision to the BIA. He argued the IJ committed legal errors in denying his motion to reopen or reconsider because: there was no conflict between the provision that an IJ can reconsider or reopen a proceeding "at any time" and the post-departure bar; the post-departure bar did not apply to those, like him, who had already

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[2] We stated in *Shawnee Tribe* that "[i]t is a 'fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs.'" 423 F.3d at 1213 (quoting *United States v. Groves*, 369 F.3d 1178, 1188 n.5 (10th Cir. 2004)).

been removed and were no longer in removal proceedings; he was not legally removed; the regulation was contrary to the applicable statute; the regulation was unconstitutional; the Seventh Circuit's *Flores* decision constituted "extraordinary circumstances sufficient to invoke *sua sponte* authority"; and Rosillo-Puga was not time-barred even though three and one-half years had elapsed since his removal. *See* Notice of Appeal, Admin. R. at 42. The BIA affirmed the IJ's decision and dismissed Rosillo-Puga's appeal. The BIA agreed with the IJ that 8 C.F.R. § 1003.23(b)(1) deprived the immigration court of jurisdiction over motions to reopen or reconsider made by aliens subsequent to their departure from the United States. The Board also agreed with the IJ's conclusion that the more specific post-departure bar trumps the more general language giving the IJ authority to reopen or reconsider a proceeding *sua sponte*. This petition for review followed. Addressing the issues as the parties have presented them, we deny the petition for review.

DISCUSSION

I. Standard of Review

The BIA in this case issued a single-member brief order, pursuant to 8 C.F.R. § 1003.1(e)(5), affirming the IJ's decision. "We have held . . . that the (e)(5) brief order . . . produces an independent BIA decision that constitutes the final order of [the agency]." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). "Accordingly, in deference to the agency's own

procedures, we will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance." *Id.* "When reviewing a BIA decision, we search the record for 'substantial evidence' supporting the agency's decision." *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007). "Our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Id.* (quoting *Uanreroro*, 443 F.3d at 1204). We examine questions of law de novo. *Turgerel v. Mukasey*, 513 F.3d 1202, 1205 (10th Cir. 2008).

II. Background of Immigration Laws

We begin by detailing the history of the statute and regulations at issue in this case. The McCarran-Walter Act of 1952 established the structure of current immigration laws, Pub. L. No. 82-414, 66 Stat. 163 (March 27, 1952) (codified at 8 U.S.C. §§ 1101-1537 (1952)). As part of an amendment of the immigration laws in 1961, Congress provided that federal courts could not exercise jurisdiction over deportation and exclusion orders where the alien had departed the United States following issuance of the order. Thus, 8 U.S.C. § 1105a(c)(1962) provided:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after issuance of the order.

Three months after the enactment of the 1962 laws, the Attorney General issued implementing regulations, including 8 C.F.R. § 3.2, titled "Reopening or reconsideration before the [BIA]." That regulation paralleled § 1105a(c), and provided:

> [A] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

8 C.F.R. § 3.2 (1962) (currently 8 C.F.R. 1003.2(d)). 8 C.F.R. § 1003.23(b)(1) contains identical language governing motions to reopen or reconsider filed before an IJ. From the early 1960s until 1996, 8 U.S.C. § 1105a(c) remained unchanged from that 1961 version, as did the language of the regulations regarding motions to reopen or reconsider before an IJ and the BIA. All barred post-departure motions to reopen or reconsider. In April 1996, the Attorney General amended 8 C.F.R. § 3.2 and added numerical and time limits for motions to reopen and to reconsider, as well as prescribed contents for such a motion. The post-departure bar remained.

In September 1996, Congress made major reforms to immigration law through its enactment of the Illegal Immigration Reform and Immigrant

Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009. Among other things, the IIRIRA repealed the statutory bar to judicial review of deportation orders when the alien had departed the country and codified and enacted procedures governing the filing of motions to reopen. *See William v. Gonzales*, 499 F.3d 329, 330 (4th Cir. 2007). Thus, the current statute governing motions to reopen and reconsider provides that "[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States," 8 U.S.C. § 1229a(c)(6)(A), and that such a motion must be filed "within 30 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(6)(B). Furthermore, "[a]n alien may file one motion to reopen proceedings under this section," 8 U.S.C. § 1229a(c)(7)(A), which motion must, in general, be filed "within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(C)(I). The statute also details the required content of motions to reopen or reconsider, as well as exceptions from both the numerical limit of one motion to reopen and the time period for filing such a motion. *See* 8 U.S.C. § 1229a(c)(7)(A)-(C). The statute does not, however, contain any explicit post-departure bar to review, which, as indicated above, had previously existed in former 8 U.S.C. § 1105a(c).

On March 6, 1997, the Attorney General promulgated regulations implementing the IIRIRA. The regulations retained the post-departure bar for motions to reopen before an IJ and the BIA:

> A motion to reopen or . . . reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings, subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen . . . or reconsider, shall constitute a withdrawal of such motion.

(currently 8 C.F.R. § 1003.2(d)). Virtually identical language bars post-departure review before the IJ. *See* 8 C.F.R. § 1003.23(b)(1). Thus, the regulations continue to contain a post-departure bar to motions to reopen or reconsider before both the IJ and the BIA. Indeed, the Attorney General specifically discussed the continuing validity of the post-departure bar in the notice and comment process for the regulations implementing the IIRIRA:

> No provision of the new section 242 of the [INA] supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States. . . . The Department [of Justice] believes that the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render.

Inspection and Expedited Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,321 (March 6, 1997).

III. Validity of 8 C.F.R. § 1003.2(d) and .23(b)(1)

A.

The validity of the regulations continuing to impose a post-departure bar, and their applicability to Rosillo-Puga, are at the heart of this case. *William*, 499 F.3d 329, the only court to directly address the validity of these regulations, has determined that the regulations are invalid because they "conflict[ ] with the statute [8 U.S.C. § 1229a(c)(6)(A) and (7)(A)] by restricting the availability of motions to reopen to those aliens who remain in the United States." *Id.* at 334.[3]

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[3] We note that the Supreme Court recently tangentially discussed the departure bar in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008). In *Dada*, the Supreme Court addressed a dilemma faced by certain aliens:

> the alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis: He or she can leave the United States in accordance with the voluntary departure order; but, pursuant to [8 C.F.R. § 1003.2(d)], the motion to reopen will be deemed withdrawn. Alternatively, if the alien wishes to pursue reopening and remains in the United States to do so, he or she risks expiration of the statutory period and ineligibility for adjustment of status, the underlying relief sought.

(Continued on following page)

"'The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *Lee v. Mukasey*, 527 F.3d 1103, 1106 (10th Cir. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). "We begin by analyzing the plain language employed by Congress, and we 'must give words their ordinary or natural meaning.'" *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004)). Finally, "[w]hen a court reviews an agency's construction of the statute which it administers," it must first answer "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If congressional intent is clear from the statutory language, the inquiry is over, and both the court and the agency 'must give effect to the unambiguously expressed

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Id. at 2318 (citations omitted). The Court held that an alien should be allowed to withdraw his or her motion for voluntary departure, in order to pursue a motion to reopen. The very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here – the alien's motion to reopen would not be withdrawn but for the regulation. *See Matter of Armendarez-Mendez*, 24 I & N Dec. 646, 655 n.7 (BIA 2008) ("We perceive some tension . . . between *William* and the Supreme Court's recent precedent in *Dada v. Mukasey*, . . . which treated the departure bar as a valid constraint on the Board's authority to adjudicate motions filed by the beneficiaries of voluntary departure orders. Such treatment was essential to the *Dada* Court's portrayal of the problem to be remedied.") (citation omitted). We are aware, however, that neither party in *Dada* specifically challenged the validity of the regulations at issue.

intent of Congress.'" Lee, 527 F.3d at 1106 (quoting *Chevron*, 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Ochieng v. Mukasey*, 520 F.3d 1110, 1114 (10th Cir. 2008) (quoting *Chevron*, 467 U.S. at 843).

In accordance with *Chevron*, we begin with the plain language of the statute, 8 U.S.C. § 1229a(c)(6) and (7): "The alien may file one motion to reconsider a decision that the alien is removable from the United States." 8 U.S.C. § 1229a(c)(6)(A). "An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)." *Id.* § 1229a(c)(7)(A).

As indicated, the *William* court is the only court to specifically address the clarity or ambiguity of this statute and whether the regulations providing a post-departure bar conflict with the statute. The majority in *William* concluded "that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country." *William*, 499 F.3d at 332. The court marshaled several arguments in support of its conclusion. First, the Fourth Circuit observed that "in providing that '*an alien* may file,' the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words 'an alien.'" *Id.* Thus, the court concluded that "Congress unambiguously addressed,

and at least implicitly repealed, the regulatory post-departure bar by granting 'an alien' the right to file one motion to reopen." *Id.*

Second, the Fourth Circuit found that the:

> overall structure of § 1229a reenforces [its] reading of § 1229a(c)(7)(A) in two ways. First, the fact that Congress provided for specific limitations on the right to file a motion to reopen bolsters the conclusion that § 1229a(c)(7)(A) cannot be read to except from its terms those aliens who have departed the country. Second, and more importantly, in detailing the time limit for a motion to reopen, Congress provided that the usual 90-day limit does not apply where an alien who is applying for relief from removal as a victim of domestic violence "*is physically present in the United States at the time of filing the motion.*"

William, 499 F.3d at 333 (quoting 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV)) (internal citation and quotation omitted). Given that Congress did not include the physical presence requirement in § 1229a(c)(7)(A), the Fourth Circuit drew "a 'negative inference' from Congress' exclusion of the physical presence requirement from the statutory section under consideration." *Id.* (noting that where Congress "includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006))

(internal quotations omitted). Further, the court observed that "finding that physical presence in the United States is required before *any* motion to reopen may be filed would render the physical presence requirement expressly written into subsection (c)(7)(C)(iv)(IV) mere surplusage." *Id.* "In sum, Congress knew how to include a requirement of physical presence when it wished to do so, as it did in § 1229a(c)(7)(C)(iv)(IV). That it did not do so in the general provisions of § 1229a(c)(7)(A) leads us to conclude that Congress did not make presence in the United States a prerequisite to filing a motion to reopen." *Id.*

Having found that § 1229a(c)(7)(A) "clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed," the Fourth Circuit declared that 8 C.F.R. § 1003.2(d), containing the post-departure bar on motions to reopen, "conflicts with the statute . . . [and] lacks authority and is invalid." *Id.* at 334. The same reasoning would support the same conclusion with respect to 8 C.F.R. § 1003.23(b)(1).

Calling it "a close question," the lengthy dissent to the majority's decision in *William* explained its conclusion that "8 C.F.R. § 1003.2(d) remains a valid exercise of the Attorney General's congressionally-delegated rulemaking authority under the [Immigration and Nationality Act]." *Id.* at 335. The dissent also developed many arguments supporting its view that

Congress did not intend to, in effect, repeal the Attorney General's regulations.

First, applying the first part of the *Chevron* analysis, the dissent concluded that "§ 1229a(c)(7)(A) in isolation says nothing about the departure bar in 8 C.F.R. § 1003.2(d) or about whether the statute as a whole should be construed as repealing the departure bar." *William*, 499 F.3d at 336 (Williams, C.J., dissenting). It rejected the majority's arguments about the domestic-violence exception, noting that the "physical presence" requirement in the domestic-violence exception was enacted after the IIRIRA, and thus shed no light on Congressional intent at the time the IIRIRA was enacted, and noting, further, that the physical-presence requirement is not co-extensive with the regulatory departure bar.[4] The dissent also noted that "a nearly identical provision limiting aliens to one motion to reopen existed *before* enactment of the IIRIRA, and in the *same* regulation containing the departure bar now located in § 1003.2(d)," which undermined the "majority's conclusion that § 1229a(c)(7)(A) by itself repeals the departure ban in 8 C.F.R. § 1003.2(d)." *Id.* at 334-35.

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[4] 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV), the domestic violence exception to the limit of one motion to reopen, only requires the alien to be physically present when the motion to reopen is filed. The departure bar in the regulations provides that any departure effects a withdrawal of a previously filed motion, thereby requiring continuous presence in the United States.

Next, after rejecting the majority's conclusion that the statute unambiguously amounts to a repeal of a post-departure bar, and thereby invalidates the regulations, the dissent went on to explain its view that the statute contains no such unambiguous directive:

> Congress has said nothing explicitly about the propriety of a departure bar like the one in § 1003.2(d). William argues that because Congress codified every provision of the regulatory framework but the departure bar, that omission must have been intentional, but the obvious response to this argument is that Congress is presumed to have known about and approved of the departure bar when it amended the INA without explicitly repealing it. Congress often expressly repeals both statutory provisions[ ] and regulations, and it is reasonable to expect that Congress will speak with greater clarity in overruling long-held agency interpretations like the departure bar at issue here. Either way, the focus in this case inevitably shifts to what Congress *did not do or say,* which is a good sign that the *Chevron* inquiry must progress past step one.

Id. at 341 (internal citations omitted).

Having concluded that the statute is silent and that the agency is empowered by statute to fill in

gaps in the regulatory scheme,[5] the dissent proceeded to the second step of the *Chevron* analysis and determined whether the agency's interpretation as expressed in the regulations is "reasonable in light of the legislature's revealed design." *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). Under this deferential standard, we must give the agency's interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004). After noting that the statute addressed petitions for judicial review, whereas the regulations addressed motions to reopen before the IJ and BIA, the dissent observed the differences between the two venues are critical to explaining why Congress repealed the statutory post-departure bar but did not explicitly repeal the regulatory post-departure bars to motions before the agency: "A petition for review of a final order of removal represents an alien's first and only opportunity for judicial review of the merits of the order, whereas a motion to reopen seeks a *subsequent* opportunity for administrative review." *William*, 499 F.3d at 343 (Williams, C.J., dissenting). As the dissent further explained:

> The differences between a petition for judicial review and a motion to the BIA to

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[5] Congress has expressly delegated rule-making authority to the Attorney General to promulgate rules implementing the immigration laws. *See* 8 U.S.C. § 1103(g)(2).

> reopen proceedings . . . largely explain why Congress repealed the departure bar to judicial review and acquiesced in the continued application of the Attorney General's departure bar to BIA review. Given that the IIRIRA streamlined the rules and procedures of the INA to make it easier for the BIA to deport aliens, Congress surely must have understood that the result would be that many more aliens would be removed during the pendency of their judicial proceedings. Repealing § 1105a(c) ensured that the expedited removal of aliens would not cut off their one-and-only chance at judicial review of the merits of their removal order. But I cannot impute to Congress a similar intention to free the motion to reopen from the workings of the departure bar, given the motion's disfavored status.

Id. Thus, "Congress's repeal of the departure bar to judicial review of final removal orders has little or no bearing on the validity of the regulation's departure bar to BIA review of motions to reopen." *Id. See Pena-Muriel v. Gonzales*, 489 F.3d 438, 442 (1st Cir. 2007) (determining that Congress's repeal of § 1105a(c) "does not remotely support an argument that Congress also intended, implicitly, to allow post-departure petitions to reopen a closed administrative proceeding"). This is particularly so, given the considerable discretion and authority vested in the Attorney General to control and determine the way its agency reviews immigration decisions. *See Uanreroro*, 443 F.3d at 1203.

The dissent finally reached the ultimate question – whether the regulations are contrary to the statute. It concluded:

> Given the INA's silence with respect to the departure bar, I understand Congress's failure to explicitly repeal 8 C.F.R. § 1003.2(d) as acquiescence to its continued operation. The regulation containing the departure bar, a provision aimed at promoting finality in removal proceedings, has been the long-standing view of the Attorney General, 'a view that we [must] presume Congress understood when it amended the Act in [1996].' This presumption is especially strong here, for the Attorney General's regulation was 'fresh' when Congress enacted the IIRIRA, having been promulgated only a few months before Congress passed the IIRIRA.

William, 499 F.3d at 344. Accordingly, the dissent held that the Attorney General's regulations were a valid exercise of its regulatory authority and did not contravene the statute.

We agree with the dissent's position and conclude that 8 C.F.R. § 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(6)(A) or (7)(A). Specifically, we agree that, at the first step of the required *Chevron* analysis, the statute is simply silent on the issue of whether it meant to repeal the post-departure bars contained in the Attorney General's regulations. We certainly cannot derive a clear

meaning from the language about "an alien" or "the alien" having the opportunity to file "one" motion for reopening or reconsideration. The *William* dissent provides a thorough analysis of this point, and we agree with its discussion. *See also, Pena-Muriel*, 489 F.3d at 442 ("Congress remained silent regarding the long-standing regulatory bar imposed by 8 C.F.R. § 1003.23(b)(1).").

Having concluded that the statute is not clear and unambiguous, we turn to the second *Chevron* inquiry – "whether the agency's answer is based on a permissible construction of the statute." *Ochieng*, 520 F.3d at 1114 (quoting *Chevron*, 467 U.S. at 843). As stated above, "where Congress has not merely failed to address a precise question but has also made an explicit delegation of rulemaking authority to the agency, 'the agency's regulation is given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *William*, 499 F.3d at 335 (quoting *Household Credit Servs., Inc.*, 541 U.S. at 239). For the reasons explained in the *William* dissent, we uphold the regulations as valid under the statute. The regulations address the agency's treatment of motions to reopen, not judicial review over final orders. We further find it inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the Attorney General incorporating such a bar in his regulations. In short, we are not persuaded that Rosillo-Puga's argument that, by negative inference, Congress intentionally swept away

forty years of continuous practice by the Attorney General. It is "well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotations omitted). *See Matter of Armendarez-Mendez*, 24 I & N Dec. 646 (BIA 2008) (specifically rejecting the analysis of the *William* majority).

The dissent to this opinion relies upon quotations from *Dada* (a case not cited to us by either party) to support its view that the regulations at issue are invalid. In our view, *Dada* speaks more to status than procedure, and an alien in voluntary departure proceedings has a different status than an alien who has been removed:

> In many ways the structure of the present immigration system is predicated on the assumption that the physical removal of an alien from the United States is a transformative event that fundamentally alters the alien's posture under the law. Indeed, the ultimate purpose of a removal proceeding is, with respect to removable aliens, precisely to bring about such a physical departure. As a rule, once an alien has been removed, his underlying removal order is deemed executed, the proceedings that led to that order

> are consummated, and whatever immigration status the removed alien may have possessed before departure is vitiated. . . .
>
> The consequence of departure for a removed alien is thus not just physical absence from the country, but also a nullification of legal status, which leaves him in no better position after departure than *any other alien* who is outside the territory of the United States. In fact, an alien who physically departs the United States after being ordered removed is in a substantially *less* advantageous position than other aliens, because the existence of a removal order renders him or her inadmissible and vulnerable to heightened criminal sanctions and expedited removal procedures in the event of unlawful reentry.

Matter of Armendarez-Mendez, 24 I & N Dec. 646, 655-56 (2008). Thus, we do not view *Dada* as implicitly supporting the view that the regulations are invalid.

B.

There is an alternative basis for denying Rosillo-Puga's petition for review. As the facts set forth above indicate, Rosillo-Puga filed his motion to reconsider and/or reopen some three-and-one-half years after his removal to Mexico. Section 1229a(c)(6)(B) provides that a motion to reconsider "must be filed within 30 days of the date of entry of a final administrative

order of removal," and section 1229a(c)(7)(C)(i) provides that a motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." Thus, Rosillo-Puga's motions were untimely. While Rosillo-Puga's counsel suggested at oral argument that such time limits are subject to various tolling provisions, no one has made a serious argument that Rosillo-Puga's motions would be viewed as timely filed. Accordingly, we conclude, as the Fifth Circuit did recently, that Rosillo-Puga's petition was untimely. *See Ovalles v. Holder*, 2009 WL 2222883 (5th Cir. July 27, 2009). That basis similarly distinguishes this case from the majority's position in *William*.

Furthermore, there is an additional ground upon which to rule against Rosillo-Puga: waiver. While he has suggested that the time limits applicable to a petition to reopen or reconsider are mere rules of procedure, rather than jurisdictional impediments, there is no doubt that he has waived any argument that he should be excused from those procedural requirements. Accordingly, Rosillo-Puga's petition fails for this alternative reason.

IV. Application of Regulations

Assuming the validity of the regulations, which we have found, Rosillo-Puga argues alternatively that 8 C.F.R. § 1003.23(b)(1) does not apply to those aliens who have already been removed. He relies upon the Ninth Circuit's decision in *Lin v. Gonzales*, 473 F.3d

979 (9th Cir. 2007), in support of this argument. The regulation states that a motion to reopen or reconsider "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings." 8 C.F.R. § 1003.23(b)(1). The Ninth Circuit held that the "regulation is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she '*is* the subject of removal . . . proceedings.'" *Lin*, 473 F.3d at 982. Accordingly, "[b]ecause petitioner's original removal proceedings were completed when he was removed . . . , he did not remain the subject of removal proceedings after that time." *Id.*

The government urges us not to follow *Lin*, arguing that it misinterpreted the plain language of the regulations:

> A plain reading of both regulations[6] shows they aim to bring finality to the immigration process by preventing an alien from filing a motion to reopen after having departed the United States. The [Ninth Circuit] erred because while the regulations speak in terms of an alien who "is the subject of" removal proceedings, the regulations do not link the term "is" to the time of departure. Rather, "is" refers to an alien who at some point is in proceedings, regardless of whether he or she departs during or after those proceedings.

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[6] The government refers to both 8 C.F.R. § 1003.23(b)(1) and § 1003.2(d), which contain identical language.

Respondent's Br. at 21. The government finds reinforcement for that interpretation in the next sentence of the regulations, which states "[a]ny departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.2(d); 8 C.F.R. § 1003.23(b)(1). The government argues "[t]hat sentence also speaks in terms of an alien who 'is the subject' of removal proceedings, but necessarily deals with departures after the completion of proceedings." Respondent's Br. at 22.

We agree with the government that *Lin*'s interpretation of the regulation is problematic. Quite simply, it seems illogical to discuss motions to reopen filed by aliens *in* proceedings, as typically, a motion to reopen will be filed only by one whose proceedings are completed, and, thus, need to be "reopened." By contrast, the regulation as a whole makes sense if it addresses motions to reopen filed by those aliens who have departed following the completion of their deportation/removal proceedings, and wish to reopen them. We therefore reject Rosillo-Puga's interpretation of the regulation. *See Matter of Armendarez-Mendez*, 24 I & N Dec. 646 (BIA 2008) (specifically rejecting the *Lin* court's interpretation of the regulation); *see also Ovalles*, 2009 WL 2222883, at **8-10 (rejecting identical argument).

Rosillo-Puga also argues, alternatively, that the regulation is arbitrary and capricious as applied to him because it fails to account for the fact that his order of removal was premised on a characterization of his conviction that was subsequently overturned; that the IJ and BIA should have considered his motion *sua sponte;* and that the agency's application of the regulation violated his due process rights. We note that the Fifth Circuit has recently rejected the identical arguments, and we agree with that court's analysis. *See Ovalles,* 2009 WL 2222883, at **7-11.

Rosillo-Puga argues that the "IJ's removal order is invalid because it is based on an erroneous interpretation of the definition of a crime of violence." Pet'r's Br. at 27. While Rosillo-Puga cites some cases arguably supporting his position, as the government points out, there is ample authority to the contrary. For example, in *Navarro-Miranda v. Ashcroft,* 330 F.3d 672 (5th Cir. 2003), a case very similar factually to this case, the petitioner had previously been deported based on a drunk driving conviction, and he argued, post-departure, that the BIA should have *sua sponte* reopened his proceedings because an intervening circuit court decision held that a drunk driving conviction was not a deportable offense. The BIA declined to invoke its *sua sponte* authority, noting that the more specific post-departure bar trumped the more general *sua sponte* authority provision. In denying the petition for review, the Fifth Circuit observed that "[t]he Board's conclusion . . . is consistent with the well-established principle that 'a

final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.'" *Id.* at 676 (quoting *Teague v. Lane*, 489 U.S. 288, 308 (1989)); *see also Patel v. Atty. Gen.*, 334 F.3d 1259, 1262 (11th Cir. 2003) (dismissing petition where petitioner's prior conviction was subsequently found by state court to not constitute a deportable defense, saying "we perceive no theory under which the subsequent action of a state court could confer jurisdiction upon us that would not otherwise exist"). Thus, we cannot say that the BIA's decision was arbitrary and capricious. *See Ovalles*, 2009 WL 2222883, at **7-9.

Next, the IJ and BIA found that "when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." Memorandum & Dec. at 2, Admin. R. at 54; *see also* Order at 1, Admin. R. at 2. As we stated in *Shawnee Tribe*, "[i]t is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." 423 F.3d at 1213 (further quotation omitted). That general rule has been specifically applied to the regulations at issue here. *See Navarro-Miranda*, 330 F.3d at 676 ("[T]he BIA's reasoning that the prohibition on motions to reopen stated in § 3.2(d) [post-departure bar] overrides its § 3.2(a) power to reopen on its own motion is a reasonable interpretation of these two regulations."); *see also Mansour v. Gonzales*, 470 F.3d 1194, 1198 (6th Cir. 2006). Furthermore, we have held that

"we do not have jurisdiction to consider petitioner's claim that the [Board] should have *sua sponte* reopened the proceedings under 8 C.F.R. § 1003.2(a) because there are no standards by which to judge the agency's exercise of discretion." *Infanzon v. Ashcroft,* 386 F.3d 1359, 1361 (10th Cir. 2004). Thus, we perceive no error in the BIA's decision that, notwithstanding its *sua sponte* authority to consider motions to reopen, it declined to reopen Rosillo-Puga's proceedings in this case.[7] *See Ovalles,* 2009 WL 2222883, at **6-8.

Finally, Rosillo-Puga argues that the BIA's application of the regulatory bar to his case violated his due process rights. We disagree. "It is well-established that aliens are entitled to due process in deportation proceedings." *Pena-Muriel,* 489 F.3d at 443. "In this context, due process requires that the alien receive notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal." *Id.* Rosillo-Puga received due process in his deportation proceedings. At the time of his removal, he had been convicted of a crime that warranted his removal. He received all appropriate process before the immigration authorities, he did not seek relief from the removal order, and he waived his right to appeal the removal order. He made no attempt to alter the status of his conviction

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[7] We note that the BIA has recognized that it may reopen or reconsider a case *sua sponte* in "exceptional circumstances." *See, e.g., In re J-J,* 21 I & N. Dec. 976 (BIA 1997).

before he left the country. Now, Rosillo-Puga attempts to reopen proceedings that ended roughly five years ago, and five years following his departure. "Due process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country. Indeed, there is a strong public interest in bringing finality to the deportation process." *Id.*

CONCLUSION

We accordingly DENY the petition for review of the BIA's decision.

O'BRIEN, J. concurring.

Although the parties have argued more broadly, the principal issue presented by this case is narrow – whether an *untimely* petition to reopen or to reconsider, as it relates to an Immigration Judge (IJ), is subject to the post-departure bar found in 8 C.F.R. § 1003.23(b)(1). That issue was resolved to my satisfaction by the Fifth Circuit in *Ovalles v. Holder*, ___ F.3d ___ 2009 WL 2222883 (5th Cir. July 27, 2009). In addressing Ovalles' argument that the post-departure bar, as it relates to the Board of Immigration Appeals (BIA), was at odds with 8 U.S.C. § 1229a(c)(6)(A) and (c)(7)(A) [providing an alien the right to file one motion to reopen or to reconsider], the court said "Ovalles invokes statutory provisions that offer him no relief," *id.* at *5, because

his motion to reopen or reconsider was considerably out of time.[1]

The same is true here; a timely motion to reopen or reconsider is not before us. Rosillo-Puga did not file his motion to reopen and/or reconsider until 3 1/2 years after his removal,[2] well beyond the 30 and 90 day time limits provided by statute. *See* 8 U.S.C. § 1229a(c)(6)(A), (7)(A) (absent circumstances not present here, *see* 8 U.S.C. § 1229a(c)(7)(C)(ii)-(iv), a motion to reconsider and a motion to reopen must be filed within 30 days and 90 days, respectively, of the date of entry of the removal order).

And we need not be distracted by worrying whether the time limits for filing such motions are jurisdictional or subject to equitable considerations. If Rosillo-Puga had equitable arguments against enforcing the statutory time limits he could have filed his motion to reopen and/or reconsider and asserted them; there would be no need for his attempted end run around the statutes by appealing to the IJ to exercise *sua sponte* authority to reopen or reconsider

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[1] The post-departure bar applicable to the BIA, 8 C.F.R. § 1003.2(d), and that applicable to the IJ, 8 C.F.R. § 1003.23(b)(1), are equivalent. *See* Majority Op. at 10, 25, 20.

[2] And it was filed more than three years after the Seventh Circuit decision upon which he rests his claims. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); *see also Ovalles*, 2009 WL 2222883 at *5 (motion to reopen or reconsider filed eight months after the Supreme Court decision relied upon as basis to reopen or reconsider).

under 8 C.F.R. § 1003.23(b)(1). He waived any claim to consideration of equitable factors by his litigation strategy.[3] In the words of the Fifth Circuit: "[B]ecause [§§] 1229a(c)(6) and 1229a(c)(7) . . . do not grant [Rosillo-Puga] the right to have his facially and concededly untimely motion heard by the [IJ], he cannot rely on those statutory provisions as a basis for contending that the [IJ] was required to give *sua sponte* consideration to the merits of his . . . motion to reconsider or reopen. . . ." *Ovalles*, 2009 WL 2222883, at *6.

I would have preferred to decide this issue on the narrow grounds outlined (and convincingly explained by the Fifth Circuit). It is tempting to concur in all but Part III(A) of Judge Anderson's excellent opinion. But doing so would leave the issue presented for our

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[3] Moreover, Rosillo-Puga expressly acknowledged the untimeliness of his motion to reopen and/or reconsider in the agency proceedings. As the IJ stated in his order denying the motion: "[Rosillo-Puga] acknowledges in his motion that he is barred from seeking a motion to reconsider or to reopen due to the time constraints of 8 C.F.R. § 1003.23(b)(1) (2007). [He] requests the Immigration Judge ("IJ") to exercise his *sua sponte* authority under 8 C.F.R. § 1003.23(b)(1) to reconsider and rescind his order of removal." (R. Vol. I at 46.) The government defended against Rosillo-Puga's motion before the agency based on its untimeliness, arguing: "The current motion is dated May 2, 2007, approximately 3 ½ years after the final [removal] decision. The court is without jurisdiction to consider this motion (he was removed and it is filed outside the 30 days for motions to reconsider and 90 days for a motion to reopen). 8 C.F.R. section 1003.23." (*Id.* at 55.)

review unresolved in this circuit.[4] For that reason, I join Judge Anderson's opinion in full.

LUCERO, J., dissenting.

My respected colleagues in the majority conclude that 8 U.S.C. § 1229a is silent on the question of whether, subsequent to departure from the United States, an alien may file a motion to reconsider removability under § 1229a(c)(6)(A), or a motion to reopen removal proceedings under § 1229a(c)(7)(A). In addition, the majority holds that an Immigration Judge ("IJ") lacks the power to *sua sponte* reconsider or reopen an alien's case after an alien has departed from the United States. I disagree with both conclusions.

As to the first holding, as I read the statute, the pertinent provisions of § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee every alien the right to file one motion to reconsider removability and one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States. For this reason alone, I would invalidate the challenged portion of 8 C.F.R. § 1003.23(b)(1) under the first step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Supreme Court's recent decision in *Dada v. Mukasey*,

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[4] *Compare Arizona v. Gant*, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring).

128 S. Ct. 2307 (2008), all but compels such invalidation. As to the second holding, the post-departure bar within § 1003.23(b)(1) is consistent with the language authorizing sua sponte reconsideration or reopening by an IJ. Because there is no conflict between these provisions, an IJ retains the authority to sua sponte reconsider or reopen a proceeding even following an alien's departure from the United States.

Today's majority ruling creates a circuit split,[1] rests on a dubious interpretation of § 1229a(c)(6)(A) and (7)(A), disregards the clear import of *Dada*, and imagines a conflict between two portions of the regulation before us when there is none.

I

Under *Chevron*, "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. A plain reading of 8 U.S.C. § 1229a(c)(6)(A) and (7)(A) comfortably occupies all the space on the issue before us and leaves any potential for valid promulgation of the challenged portion of 8 C.F.R. § 1003.23(b)(1) outside in the bitter cold. As the Court said in *Chevron*, "If the intent of

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[1] Specifically, the majority's holding regarding the validity of 8 C.F.R. § 1003.23(b)(1) squarely conflicts with the conclusion reached by the Fourth Circuit in *William v. Gonzales*, 499 F.3d 329, 334 (4th Cir. 2007).

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If there be any doubt as to the plain reading of § 1229a(c)(6)(A) and (7)(A), *Dada* puts it to rest.

A

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Section 1229a(c)(6)(A) provides, "The alien may file one motion to reconsider a decision that the alien is removable from the United States," and § 1229a(c)(7)(A) provides, "An alien may file one motion to reopen proceedings under this section. . . ."[2] The language Congress chose is plain and unequivocal. It draws no distinction between aliens who are in the country and aliens who have departed. All aliens are treated alike under the terms of § 1229a(c)(6)(A) and (7)(A), and all aliens are guaranteed the right to file one motion to reconsider and one motion to reopen. *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007) ("We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country."); *see*

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[2] These sections were added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA" or the "Act"), Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009-546, 3009-593 (1996).

Azarte v. Ashcroft, 394 F.3d 1278, 1285-86 (9th Cir. 2005) ("With respect to motions to reopen . . . , Congress' language in IIRIRA is clear and unambiguous: 'An alien may file one motion to reopen proceedings.'" (quoting § 1229a(c)(6)(A) (2004)) (footnote omitted)).[3] The post-departure bar, which prohibits departed aliens from filing a motion to reconsider or reopen, conflicts with this unambiguous statutory language. *See* 8 C.F.R. § 1003.23(b)(1).[4]

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[3] At the time of the Ninth Circuit's decision in *Azarte*, motions to reconsider were governed by § 1229a(c)(5) and motions to reopen were governed by § 1229a(c)(6). In 2005, Congress amended § 1229a, redesignating subsection (c)(5) as (c)(6) and (c)(6) as (c)(7). *See* Real ID Act of 2005, Pub. L. No. 109-13, div. B, § 101(d)(1), 119 Stat. 302, 304 (2005).

[4] The regulation setting forth the post-departure bar provides:

> An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. . . . *A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.* Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.23(b)(1) (emphasis added). It is the emphasized portion of this section that Rosillo-Puga has challenged, and that I refer to throughout as "the post-departure bar."

(Continued on following page)

Despite this clear language, the majority concludes that § 1229a(c)(6)(A) and (7)(A) are silent on the question of whether a certain subclass of aliens – those who have departed the United States – may file one motion to reconsider and reopen. Maj. Op. at 19. Surely this cannot be correct. Sections 1229a(c)(6)(A) and (7)(A) speak in absolute and unequivocal terms: "*The alien* may file one motion to reconsider," § 1229a(c)(6)(A) (emphasis added), and "*[a]n alien* may file one motion to reopen," § 1229a(c)(7)(A) (emphasis added). My colleagues conclude not that Congress was silent regarding which aliens may file motions, but rather, that Congress was silent regarding whether any subclass of aliens might nonetheless be excluded. Maj. Op. at 19. Under the majority's approach, *Chevron* would require that Congress expressly enumerate all that an agency *cannot do* before we may conclude that Congress "has directly spoken to the precise question at issue." *See* 467 U.S. at 842. The majority would thus preclude customary expression of Congressional intent by the use of expansive and inclusive permissions such as those in § 1229a(c)(6)(A) and (7)(A).

My colleagues' reasoning conflicts with the thrust of *Chevron*: we are to initially look at the plain language of an act, and if there be any doubt, only

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A parallel regulation, which applies to the Board of Immigration Appeals ("BIA") rather than to IJs, appears at 8 C.F.R. § 1003.2. In *William*, the Fourth Circuit invalidated the post-departure bar contained in § 1003.2(d). 499 F.3d at 334.

then are we to look to the intent of Congress using additional tools of statutory construction. *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). On the issue before us, a plain reading of the text of the statute compels the conclusion that § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee all aliens the right to file one motion to reconsider and one motion to reopen.

Before today, we have followed the dictates of *Chevron*, giving effect to the clear intent of Congress in determining whether a regulation is consistent with the governing act. For example, in *Lee v. Gallup Auto Sales, Inc.*, we invalidated a regulation that exempted from the Odometer Act a subclass of motor vehicles which were neither explicitly nor implicitly exempted under the terms of the pertinent statute. 135 F.3d 1359, 1360-62 (10th Cir. 1998). Under the terms of the Odometer Act, a transferor was required to disclose certain information whenever ownership of "a motor vehicle" was transferred. *Id.* at 1360 (quoting 15 U.S.C. § 1988(a) (1993) (current version at 49 U.S.C. § 32705 (2008))) (emphasis added). Nevertheless, the Secretary of Transportation promulgated a regulation exempting from the disclosure requirements those motor vehicles ten years old or older. *Id.* (citing 49 C.F.R. § 580.6(a)(3) (1993) (current version at 49 C.F.R. § 580.17(a)(3) (2008))). "Because the text of the Odometer Act d[id] not even suggest – much

less explicitly state – a legislative intent to exempt entire classes of vehicles from the disclosure requirements of the Act," we invalidated the regulation as contrary to the clear meaning of the statute. *Id.* at 1361 (quotation omitted); *see also Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1280-81 (10th Cir. 1998) (invalidating a regulation that exempted from the disclosure requirements of the Odometer Act those vehicles with a gross vehicle weight rating in excess of 16,000 pounds because the Act was unambiguous in its failure to authorize such an exemption).

In this case, the language of § 1229a(c)(6)(A) and (7)(A) does not evince a congressional intent to exclude subclasses of aliens from the statutorily-guaranteed right to file one motion to reconsider and one motion to reopen. Quite to the contrary, inclusive terms "[t]he alien" and "[a]n alien" indicate a congressional intent that *all* aliens subject to a removal order are entitled to file such motions. Assuredly, the Attorney General cannot by regulation rewrite the Act to exempt an entire subclass of aliens when Congress itself chose not to authorize such an exemption. *See Suiter*, 151 F.3d at 1280-81; *Lee*, 135 F.3d at 1360-62.

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Structurally, § 1229a reinforces my interpretation. Throughout § 1229a, Congress codified a number of limitations on an alien's right to file for

reconsideration or reopening. Those limitations are express and clear. *See* § 1229a(c)(6)(B) (motions to reconsider must be filed within 30 days of final removal order); § 1229a(c)(6)(C) (motions to reconsider must challenge errors of law or fact, rather than the exercise of discretion, and must be supported by pertinent authority); § 1229a(c)(7)(B) (motions to reopen must state new facts and be supported by evidentiary material); § 1229a(c)(7)(C) (motions to reopen must generally be filed within 90 days of final removal order). In doing so, Congress clearly considered the need to limit the filing of such motions and selected a precise scheme of time, number, and content restrictions.

Sections 1229a(c)(6)(A) and (7)(A) also include an express limitation: aliens are limited to *one* motion to reconsider and *one* motion to reopen.[5] In contrast, what § 1229a does not do is limit by geography the class of aliens eligible to file motions to reconsider and reopen. That Congress expressly included multiple limitations, but chose not to include another – one based on geography – presents a paradigmatic example of the canon of statutory construction *expressio unius est exclusio alterius*. *See United States v.*

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[5] The House Report accompanying the passage of IIRIRA shows that Congress considered § 1229a(c)(6)(A) and (7)(A) to embody an important limit on an alien's right to file motions to reconsider and reopen: "Aliens are limited to a single motion to reconsider and a single motion to reopen removal proceedings." H.R. Rep. No. 104-469, pt. 1, at 159 (1996).

Brown, 529 F.3d 1260, 1265 (10th Cir. 2008); *see also United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *United States v. Goldbaum*, 879 F.2d 811, 813 (10th Cir. 1989) ("As a general principle of statutory interpretation, if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded.").

This point is supported by another provision in the same statute. In § 1229a(c)(7)(C)(iv)(IV), Congress *did* include a geographic condition, exempting victims of domestic violence from the deadline for filing a motion to reopen "if the alien *is physically present in the United States* at the time of filing the motion." 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) (emphasis added); *see Sanchez v. Keisler*, 505 F.3d 641, 642 (7th Cir. 2007).[6] Obviously aware of the potential for such a distinction, Congress chose not to include similar language in § 1229a(c)(6)(A) and (7)(A). This textual contrast serves as a buttress to the conclusion that Congress

[6] Imposing a "physical presence" requirement on aliens who seek to invoke the § 1229a(c)(7)(C)(iv) "special rule for battered spouses, children, and parents," but not on other aliens, is only logical. This rule was enacted to protect aliens who have "been battered or subjected to extreme cruelty *in the United States*" in connection with their need for immigration benefits. 8 U.S.C. § 1641(c)(1)(A) (emphasis added).

did not intend to limit by geography the availability of motions to reconsider or reopen. Indeed, by concluding as it does that an alien must be in the United States to file *any* motion to reconsider or reopen, the majority would "render the physical presence requirement expressly written into subsection (c)(7)(C)(iv)(IV) mere surplusage." *William*, 499 F.3d at 333.

Relying on the dissent in *William*, the majority advances two reasons to disregard the inference I draw from the existence of the physical presence requirement in § 1229a(c)(7)(C)(iv)(IV) and its conspicuous absence in § 1229a(c)(6)(A) and (7)(A). Maj. Op. at 15-16; *see William*, 499 F.3d at 337-38 (Williams, J., dissenting). First, my colleagues note that the physical-presence requirement was added in 2006, *see* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825, 119 Stat. 2960, 3063-64 (2006), and therefore infer that it sheds no light on what Congress intended when it enacted IIRIRA in 1996, *see William*, 499 F.3d at 337. Second, the majority agrees that "§ 1229a(c)(7)(C)(iv)(IV)'s physical-presence requirement is not coextensive with the regulatory departure bar." *Id.*

The majority's first argument is wrong on two counts. As an initial matter, whether particular language in the statute was added in 1996 or 2006, we must still read the statute as a whole. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it

can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotations omitted)); *Bridger Coal Co./Pac. Minerals, Inc., v. Dir., Office of Workers' Comp. Programs,* 927 F.2d 1150, 1153 (10th Cir. 1991) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous."). If physical presence in the United States were already required of aliens before they filed a motion to reconsider or reopen under § 1229a(c)(6)(A) and (7)(A), the "physically present" language in § 1229a(c)(7)(C)(iv)(IV) would be entirely superfluous.

Second, it is equally probable that Congress included the "physically present" language in 2006 precisely because § 1229a(c)(6)(A) and (7)(A) contain no such requirement. In other words, Congress in 2006 understood perfectly well what it had done in 1996: all aliens, whether or not physically present in the United States, were granted the right to file one motion to reconsider and one motion to reopen. Congress also imposed a strict time limit – a limit it then chose to lift in 2006 for qualifying victims of domestic violence filing a motion to reopen while *physically present* in the United States. § 1229a(c)(7)(C)(iv)(IV); *see William,* 499 F.3d at 333 (majority op.) ("Congress knew how to include a requirement of physical presence when it wished to do so, as it did in § 1229a(c)(7)(C)(iv)(IV).").

We are offered a second explanation for rejecting the logical inference which should be drawn from the "physically present" language: the 8 U.S.C.

§ 1229a(c)(7)(C)(iv)(IV) requirement could be read as different in scope from the 8 C.F.R. § 1003.23(b)(1) post-departure bar. My majority colleagues embrace the thinking of the *William* dissent:

> [O]ne can reasonably understand § 1229a(c)(7)(C)(iv)(IV) to mean that as long as the qualifying alien files a motion to reopen before departing the country, the alien's subsequent departure from the United States has no effect on the BIA's ability to hear the motion, which is a decidedly different result than would obtain under the [post-]departure bar.

William, 499 F.3d at 337-38 (Williams, J., dissenting).

In choosing the position of the *William* dissent, the majority concludes that Congress intended to benefit qualifying aliens by allowing the BIA to consider a motion to reopen even after those aliens have departed from the United States, whereas all other aliens would forfeit such motions by departing under the terms of the bar. But this interpretation is incompatible with the next portion of the same statutory subsection. In addition to excepting domestic violence victims from certain time limitations "if the alien is physically present in the United States at the time of filing the motion," § 1229a(c)(7)(C)(iv) continues:

> The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien . . . pending the final disposition of the motion, including exhaustion of

> all appeals if the motion establishes that the alien is a qualified alien.

Thus, removal from the United States of a qualifying domestic violence victim is stayed pending the resolution of the victim's motion to reopen. For a stay of removal to have teeth, the alien must be "physically present" in the United States. Once removal of a qualifying alien is stayed, the alien will presumably remain in the United States.[7] And if the alien remains in the United States, the post-departure bar will never be implicated. Thus, it simply cannot be correct that the "physically present" language in § 1229a(c)(7)(C)(iv)(IV) "carv[es] out a limited exception to the general working of the [post-]departure bar." *William*, 499 F.3d at 337. The post-departure bar does not come into play when removal of a qualifying alien has been stayed.

3

The history of IIRIRA further supports a plain text reading of § 1229a(c)(6)(A) and (7)(A). Until 1996,

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[7] Even if an alien agreed to voluntary departure, *Dada* allows the alien to withdraw consent to voluntary departure and remain in the United States. 128 S. Ct. at 2319; *see infra* Part I.B. The majority's interpretation would thus operate to protect the rare individual who, notwithstanding the stay of removal, chose to leave the country. It hardly seems likely that this subgroup of aliens, should such a subgroup exist, was the object of Congress's concern and motivated the inclusion of § 1229a(c)(7)(C)(iv)(IV).

there existed by statute a post-departure bar to judicial review of deportation orders. 8 U.S.C. § 1105a(c) (1995) ("An order of deportation or of exclusion shall not be reviewed by any court *if the alien . . . has departed from the United States after the issuance of the order.*" (emphasis added) (repealed 1996)). Moreover, motions to reconsider and reopen were entirely creatures of regulation until 1996. *William,* 499 F.3d at 330 (majority op.); *Azarte,* 394 F.3d at 1283. In line with the statutory post-departure bar to judicial review, the Code of Federal Regulations provided at the time that "[a] motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States." 8 C.F.R. § 3.2 (1995) (current versions at § 1003.2(d) (2008), governing motions before the BIA, and § 1003.23(b)(1) (2008), governing motions before an IJ). When Congress enacted IIRIRA in 1996, the statutory scheme changed substantially.

On point, IIRIRA accomplished two significant goals. First, the Act repealed § 1105a(c) and granted circuit courts jurisdiction to review orders of removal. *William,* 499 F.3d at 330; *see* IIRIRA, Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-607 to 612 (1996) (codified as amended at 8 U.S.C. § 1252); 8 U.S.C. § 1252(a)(5). Second, the Act codified the statutory right of all aliens to file one motion to reconsider and one motion to reopen. *William,* 499 F.3d at 330; *see* 8 U.S.C. § 1229a(c)(6)(A) & (7)(A).

Again we are driven to one conclusion: Congress knew how to codify a post-departure bar when it so elected. Such a bar prohibited *all* judicial review until 1996. That Congress chose not to include a post-departure bar to the filing of motions to reconsider and reopen when it enacted § 1229a(c)(6)(A) and (7)(A) demonstrates that Congress did not intend to authorize such a limitation.

4

At bottom, the government's argument in support of the validity of the post-departure bar amounts to this: prohibiting departed aliens from filing motions to reconsider or reopen is good policy. In its brief, the government fails to engage in a *Chevron* analysis and devotes itself almost entirely to defending the efficiency of the post-departure bar. According to the government, the regulatory bar is consistent with the Congress's purpose in passing IIRIRA – "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Invalidating the post-departure bar, the government tells us, would be inconsistent with this congressional purpose.

As an initial matter, the government's policy argument presents a non-sequitur. Merely because the post-departure bar may be consistent with the broad purpose of the IIRIRA, it does not follow that invalidating the regulation is inconsistent with that

purpose. Even were we to assume that the sole purpose of the IIRIRA is to facilitate removal of deportable aliens, the interpretation of § 1229a(c)(6)(A) and (7)(A) advanced by this dissent is fully consistent with that goal.[6] Facially, these sections "make it easier to remove deportable aliens" because aliens are limited to *one* motion to reconsider and *one* motion to reopen within an express time limitation. As discussed, Congress was attentive to the need to limit motions to reconsider and reopen, but chose an approach different from that promulgated by the Attorney General in § 1003.23(b)(1). Because a departed alien seeking to file a motion to reconsider or reopen has already left the United States, the alien cannot use these motions as a means of delaying removal.

As with an inconsistent regulation, when the meaning of a statute is plain and clear, there is no room left in the interpretive equation for policy arguments and they too must be left outside in the unsheltered cold. "When the words of a statute are unambiguous, . . . this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank. v. Germain,* 503 U.S. 249, 254 (1992) (quotation omitted). What we wrote in *Lee* is equally applicable

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[6] Moreover, simply because a statute is generally intended to facilitate enforcement does not mean that every provision therein must be interpreted to maximally benefit the government and disadvantage the regulated individual. If that were Congress's intent, there would be little reason to allow motions to reconsider or reopen at all.

here: "There may be good policy reasons for exempting" departed aliens from § 1229a(c)(6)(A) and (7)(A), "but that determination is legislative in nature and is properly made by Congress, and not by regulatory fiat." *See Lee*, 135 F.3d at 1361 (quotation omitted).

B

The Supreme Court's recent decision in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), further supports the conclusion that the post-departure bar is inconsistent with § 1229a(c)(6)(A) and (7)(A). In *Dada*, the Court held that all aliens have a "statutory right" to file one motion to reopen, writing "the statutory text [of § 1229a(c)(7)(A)] is plain insofar as it guarantees to each alien the right to file 'one motion to reopen proceedings.'" 128 S. Ct. at 2316, 2317. The Court then relied upon this conclusion to interpret 8 C.F.R. § 1003.2(d), which is functionally identical to the relevant portion of § 1003.23(b)(1) and provides that an alien's departure from the United States effects a withdrawal of his motion to reopen. Given the unambiguous congressional command of § 1229a(c)(7)(A) that each alien may file one motion to reopen, the Court reasoned that an alien must be permitted to withdraw consent to voluntary departure if necessary to "safeguard the right to pursue" the statutorily-guaranteed motion.[9] *Id.* at 2319. Otherwise, an alien

[9] Voluntary departure is a statutory process by which certain aliens can leave the country willingly within a prescribed time frame. *Dada*, 128 S. Ct. at 2312. In exchange for saving the

(Continued on following page)

agreeing to voluntarily depart would face a Catch-22 situation incompatible with the clear statutory text. Either the alien would have to depart the United States and his motion to reopen would be deemed withdrawn, or the alien could remain in the United States in order to obtain a ruling on the motion, thus staying beyond the voluntary departure period and risking the loss of eligibility for a potential adjustment of status. This, of course, is the very relief being sought through the motion to reopen. *Id.* at 2318. The Court pointedly noted that Dada had not challenged the validity of the underlying rule that deems a motion to reopen withdrawn if the alien leaves the United States. *Id.* at 2320. The validity of § 1003.2(d) was therefore not at issue in *Dada*, but the validity of closely analogous § 1003.23(b)(1) *is* squarely before us today.

Notably, the *Dada* Court held that withdrawal of consent to voluntary departure must be permitted precisely because § 1229a(c)(7)(A) is clear and unambiguous: an alien *must* be allowed to file one motion to reopen. 128 S. Ct. at 2316. In rejecting the

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government the expense and burden of deportation, the alien avoids prolonged detention, chooses the country of destination, and facilitates the possibility of readmission. *Id.* at 2314. "Voluntary departure serves the practical goals of reducing the costs associated with deporting individuals from the United States and providing a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation." *Azarte*, 394 F.3d at 1284.

government's contrary position – that an alien is not entitled to pursue a § 1229a(c)(7)(A) motion following a voluntary departure – the Court reasoned that "[i]t would render the *statutory right* to seek reopening a nullity in most cases of voluntary departure." *Id.* at 2317 (emphasis added). But one inescapable conclusion can be drawn from that language: an alien cannot be forced by regulation to forfeit a motion guaranteed by statute.

The logic of *Dada* applies with equal force to the case before us. Just as the language of § 1229a(c)(7)(A) is plain, *see Dada*, 128 S. Ct. at 2316, the language of § 1229a(c)(6)(A) is equally plain: all aliens have the right to file one motion to reconsider regardless of whether they have departed from the United States. As in *Dada*, Rosillo-Puga cannot be forced by regulation to forfeit the right to file one motion to reconsider and one motion to reopen. Because § 1003.23(b)(1) accomplishes exactly that forbidden result, that regulation cannot stand. *See Costello v. INS*, 376 U.S. 120, 127-28 (1967) ("[Courts should] hesitate long before adopting a construction of [a statute] which would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme.").[10]

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[10] The majority's attempt is distinguish *Dada* is unpersuasive. My colleagues read *Dada* as affirming the validity of § 1003.23(b)(1). Maj. Op. at 1153 n.3 ("The very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here."). In fact, the

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C

My colleagues offer a final reason to deny Rosillo-Puga's appeal: His motion was untimely. It is well established, however, that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002). Neither the IJ nor the BIA based its dismissal of Rosillo-Puga's motion on timeliness. My colleagues offer no reason to depart from the general rule of *Chenery*. We

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Court necessarily *assumed* the validity of § 1003.23(b)(1), just as it assumed the validity of § 1003.2(d). This is entirely unremarkable, as neither regulation was challenged before the Court. *See Dada*, 128 S. Ct. at 2320 ("This regulation, however, has not been challenged in these proceedings, and we do not consider it here."). Moreover, the majority places undue reliance on the BIA's decision in *Matter of Armendarez-Mendez*, 24 I & N Dec. 646, 655-56 & n.7 (2008). This court owes no deference to an agency's interpretation of a Supreme Court decision. Nor do we defer to an agency's interpretation of an unambiguous statute. *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

thus may not uphold the BIA's decision on the ground of untimeliness.[11]

II

Although I would invalidate the challenged portion of § 1003.23(b)(1), I note briefly my further disagreement with the majority's conclusion that an IJ lacks sua sponte authority to reconsider or reopen a removal proceeding after an alien has departed the United States. Maj. Op. at 25-26. My colleagues reach this conclusion by invoking the "canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1213 (10th Cir. 2005) (quotation omitted). In their view, the specific

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[11] This circuit has already determined that the ninety-day statutory deadline for filing a motion to reopen may be tolled. *See Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002). Accordingly, it is not a jurisdictional limit and should not be raised sua sponte. Other circuits are in accord. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190-93 (9th Cir. 2001) (en banc); *Iavorski v. INS*, 232 F.3d 124, 130-34 (2d Cir. 2000). My colleagues apparently assume that the filing deadline contained in § 1229a(c)(6)(B) is similarly not a jurisdictional restriction. *Cf. Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (holding that the 180-day filing deadline applicable to motions to reopen from removal orders filed in absentia is not jurisdictional); *Borges v. Gonzales*, 402 F.3d 398, 405-06 (3d Cir. 2005);(same); *Lopez v. INS*, 184 F.3d 1097, 1098 (9th Cir. 1999) (same). But *see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (holding that the 180-day filing deadline is "jurisdictional and mandatory").

provision in § 1003.23(b)(1) that prohibits a departed alien from filing a motion to reconsider or reopen "subsequent to his or her departure from the United States" trumps the general provision authorizing an "Immigration Judge upon his or her own motion at any time, . . . [to] reopen or reconsider any case in which he or she has made a decision." 8 C.F.R. § 1003.23(b)(1).[12]

Contrary to the majority's view, there is simply no conflict between these two provisions. One speaks to the authority of the IJ, the other to the rights of aliens. The general provision in the regulation allows an IJ "at any time" to reopen or reconsider a case. The post-departure bar, by contrast, says nothing about the power of an IJ. Rather, it provides that "A motion to reopen or to reconsider *shall not be made* by . . . a person . . . subsequent to his or her departure from the United States." Under a proper reading of § 1003.23(b)(1), although an alien may not move for reconsideration or reopening following departure, an

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[12] The majority also notes in passing that "we do not have jurisdiction to consider petitioner's claim that the [IJ] should have sua sponte reopened the proceedings under [8 C.F.R. § 1003.23(b)(1)] because there are no standards by which to judge the agency's exercise of discretion." Maj. Op. at 25 (quotation omitted). Although that may be true, it has no relevance to this case. Here, the IJ did not exercise his discretion not to reconsider or reopen. Quite the contrary, the IJ concluded as a legal matter that he lacked discretion entirely, given the post-departure bar. That legal conclusion is reviewable by this court, *see* 8 U.S.C. § 1252(a)(2), and it is erroneous. *See infra*.

IJ always retains the discretionary authority to sua sponte reopen or reconsider a case.[13]

III

For the foregoing the reasons, I would strike down the challenged portion of 8 C.F.R. § 1003.23(b)(1) under the first step of *Chevron*.[14] I consider it unnecessary for us to reach the sua sponte authority of an IJ to reconsider or reopen Rosillo-Puga's case, but were we to reach the issue, I would conclude that the IJ does possess such authority. The majority having concluded otherwise on both counts, I respectfully dissent.

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[13] On point, the BIA is of the view that it can reconsider or reopen a case sua sponte in "exceptional circumstances" pursuant to 8 C.F.R. § 1003.2 which, as noted, is functionally identical to the regulation at issue here, except that it applies to the BIA rather than to the IJ. *See, e.g., In re J-J*, 21 I & N Dec. 976, 984 (1997) (citing 8 C.F.R. § 3.2(a) (1997)) (current version at 8 C.F.R. § 1003.2(a) (1998)); *see also* Maj. Op. at 26 n.7.

[14] Assuming the challenged portion of § 1003.23(b)(1) is valid, I agree that the regulation applies to Rosillo-Puga, that it is not arbitrary or capricious as applied, and that it does not violate due process.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN ROSILLO-PUGA, a/k/a Martin Puga, a/k/a Martin Rosillo,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 07-9564

THE AMERICAN IMMIGRATION LAW FOUNDATION,

Amicus Curiae.

JUDGMENT

(Filed Sep. 15, 2009)

Before **LUCERO, ANDERSON,** and **O'BRIEN,** Circuit Judges.

This case is a petition for review from the Board of Immigration Appeals and was argued by counsel.

The petition for review is denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A72 663 412 – Aurora, CO Date: AUG 10, 2007

In re: MARTIN ROSILLO-PUGA a.k.a. Martin Puga
a.k.a. Martin Rosillo

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Rachel E. Rosenbloom, Esquire

ON BEHALF OF DHS: Dani Lisa Page
Deputy Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated May 24, 2007. The Immigration Judge denied the respondent's motion to reconsider. The Immigration Judge found that he lacked jurisdiction to consider the respondent's motion pursuant to the regulation at 8 C.F.R. § 1003.23(b)(1), due to the departure of the respondent from the United States under a final order of removal. The respondent's appeal will be dismissed.

We affirm the Immigration Judge's decision pursuant to our authority at 8 C.F.R. § 1003.1(e)(5). The regulation at 8 C.F.R. § 1003.23(b)(1) specifically provides that "a motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion

proceedings subsequent to his or her departure from the United States." The Board interpreted identical regulatory language in *Matter of G-N-C*, 22 I&N Dec. 281, 288 (BIA 1998). Specifically, the Board found that it lacked jurisdiction over a motion to reopen after the respondent's departure from the United States pursuant to a final order of deportation under the regulation at 8 C.F.R. § 1003.2(d), the regulation governing motions filed before the Board after an alien's departure from the United States. *See Matter of G-N-C-, supra.* Furthermore, we agree with the Immigration Judge's determination that the specific regulatory language prohibiting motions after the alien has departed the United States overrides the more general regulatory language affording the Immigration Judge the right to reopen or reconsider *sua sponte. See generally, Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675 (5th Cir. 2003) (finding reasonable the Board's determination that the specific regulation prohibiting motions to reopen after an alien has departed from the United States overrides the more general regulation affording the Board authority to reopen *sua sponte*); *Mansour v. Gonzales,* 470 F.3d 1194, 1198 (6th Cir. 2006) (same, citing *Navarro-Miranda* with approval in concluding that the Board lacked jurisdiction to consider a motion to reopen once the alien has left the country). In light of the foregoing, we find no error in the Immigration Judge's determination that he lacked jurisdiction to consider the respondent's motion to reconsider after he departed from the United States under a final

order of removal. Accordingly, the respondent's appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT ST., RM 1403
DENVER, CO 80294

In The Matter Of:	Date: May 24, 2007
ROSILLO-PUGA, Martin	Docket: Denver, CO
Respondent.	
File Number: A 72-663-412	

APPLICATION: Motion to Reconsider and Rescind Removal Order, or in the Alternative to Reopen Proceedings

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE DHS:
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Department of Homeland Security
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MEMORANDUM AND DECISION

The respondent Martin Rosillo-Puga ("Respondent") is a native and citizen of Mexico who was admitted as a conditional resident, class CR6, on July 18, 1995. By order dated August 18, 2003, this Court ordered Respondent removed from the United States to Mexico after it found that his conviction in the Superior Court of Indiana, County of Marion, for the offense of battery in violation of 49-F17-9705 CM-071502 of the Indiana criminal code on June 24, 1997 constituted an aggravated felony under INA § 101(a)(43) and was removable under INA §§ 237(a)(2)(A)(iii) and 237(a)(2)(E)(i). Respondent waived his appeal and the IJ's decision became final. *See* 8 C.F.R. § 1003.39. Respondent was thereafter physically removed to Mexico.

On May 7, 2007, Respondent, through counsel, filed a Motion to Reconsider and Rescind Removal Order, or in the Alternative to Reopen Proceedings. Respondent acknowledges in his motion that he is barred from seeking a motion to reconsider or to reopen due to the time constraints of 8 C.F.R. § 1003.23(b)(1) (2007). Respondent requests the Immigration Judge ("IJ") to exercise his *sua sponte* authority under 8 C.F.R. § 1003.23(b)(1) to reconsider and rescind his order of removal. The Department of Homeland Security ("DHS") filed a response on May 14, 2007 opposing the motion and stating this Court lacks jurisdiction to entertain it.

In most circumstances, an IJ has general discretion to reopen and reconsider proceedings pursuant to 8 C.F.R. § 1003.23(b)(1). However, within the same subsection of this regulation it specifically states that "[a] motion to reopen or to reconsider *shall not* be made by or on behalf of a person who is the subject of [removal proceedings] subsequent to his . . . departure from the United States." *Id.* (emphasis added). This specific provision precludes the IJ to exercise his general discretion in reopening and reconsidering proceedings under such circumstances. *See In Re G-N-C-*, 22 I&N Dec. 281, 288 (BIA 1998) (in interpreting identical language of what is now 8 C.F.R. § 1003.2(d), the BIA held that it "lacks jurisdiction over a motion to reopen after [a] respondent's departure from the United States pursuant to a final order of deportation").

The Court acknowledges the well-drafted motion made by Respondent's counsel; however, it is not persuaded by Respondent's arguments that this Court has jurisdiction to reconsider or reopen his proceedings. In his motion, Respondent asserts that the provision in 8 C.F.R. § 1003.23(b)(1) that permits an IJ to, "at any time, . . . reopen or reconsider any case in which he or she has made a decision" trumps the later provision in the same regulation which forbids such motions which are made "on behalf of a person who is the subject of removal . . . proceedings subsequent to his or her departure from the United States." In fact, it is this Court's opinion that the exact opposite is the correct interpretation. The Tenth

Circuit has noted that "it is a 'fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs.'" *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1213 (10th Cir. 2005) (quoting *U.S. v. Groves*, 369 F.3d 1178, 1188 n.5 (10th Cir. 2004)). In 8 C.F.R. § 1003.23(b)(1), the general *sua sponte* authority given to an IJ to reopen and reconsider proceedings is limited by the more specific prohibition on making such motions on behalf of a person who has departed after an order of removal. *See also Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) (holding *sua sponte* authority is preempted by this language because, "as a fundamental rule of statutory interpretation, specific provisions trump general provisions").

Accordingly, **IT IS HEREBY ORDERED that Respondent's Motion to Reconsider and Rescind Removal Order, or in the Alternative to Reopen Proceedings is DENIED.**

May 24, 2007 /s/ [Illegible]
DAVID CORDOVA
IMMIGRATION JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN ROSILLO-PUGA, a/k/a Martin Puga, a/k/a Martin Rosillo,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 07-9564

AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD,

Amici Curiae.

ORDER

(Filed Dec. 8, 2009)

Before **LUCERO, ANDERSON,** and **O'BRIEN,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in

regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Amici Curiae American Immigration Council and National Immigration Project of the National Lawyers Guild's motion to become amicus is granted. The brief shall be shown as filed on November 13, 2009.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

8 U.S.C.A. § 1229a [(c)(6)(A) and (7)(A)] Removal Proceedings

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

8 C.F.R. § 1003.23 Reopening or reconsideration before the Immigration Court.

(b) Before the Immigration Court –

(1) In general. An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the

Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

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(2)

Supreme Court, U.S.
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No. 09-1367

In the Supreme Court of the United States

MARTIN ROSILLO-PUGA, AKA MARTIN PUGA, AKA MARTIN ROSILLO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 8 C.F.R. 1003.23(b)(1), which precludes immigration judges from granting motions to reopen or reconsider filed by aliens who have departed the United States, is valid as applied to motions seeking *sua sponte* reopening or reconsideration.

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In the Supreme Court of the United States

No. 09-1367

MARTIN ROSILLO-PUGA, AKA MARTIN PUGA, AKA MARTIN ROSILLO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-56) is reported at 580 F.3d 1147. The opinions of the Board of Immigration Appeals (Pet. App. 59-61) and the immigration judge (Pet. App. 62-65) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57-58) was entered on September 15, 2009. A petition for rehearing was denied on December 8, 2009 (Pet. App. 66-67). On March 1, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 7, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), .23(b)(1) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), .23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), .23(b)(1). Those limitations do not apply, however, if the motion to reopen adequately shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered," since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), .23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the

Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

b. An alien may file one motion to reconsider any order of the Board or the IJ. 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), .23(b). The alien may file only one such motion for any given decision, and it must be filed within 30 days of the date of entry of the decision of which reconsideration is sought. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2), .23(b)(1). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1), .23(b)(2). Whether to grant a motion to reconsider is discretionary. See, *e.g.*, *Liu* v. *Mukasey*, 553 F.3d 37, 40 (1st Cir. 2009).

c. If an alien does not file his motion to reopen within the 90-day time period, or file his motion to reconsider within the 30-day time period, the IJ or the Board still may reopen or reconsider his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). Whether to reopen or reconsider a case *sua sponte* is entrusted to the broad discretion of the Board or IJ. 8 C.F.R. 1003.2(a), .23(b)(1). The Board and the IJs "invoke [their] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy re-

served for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Longstanding regulations of the Attorney General bar aliens who have departed the United States from obtaining reopening or reconsideration of their immigration cases.

a. The Attorney General has provided for discretionary reopening and reconsideration in immigration proceedings by regulation since 1941. See 6 Fed. Reg. 71-72 (1941). In 1952, the Attorney General amended his regulations to bar immigration officials from granting a motion to reopen or reconsider filed by an alien who has departed the United States. 17 Fed. Reg. 11,475 (1952) (8 C.F.R. 6.2 (1952)); see *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 648-649 (B.I.A. 2008). That bar has remained substantially the same since 1952. In its current form, the regulation addressing reopening or reconsideration motions before an IJ provides:

> A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

8 C.F.R. 1003.23(b)(1). Another regulation, 8 C.F.R. 1003.2(d), places the same restrictions on reopening or reconsideration before the Board.

b. Prior to 1996, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not address whether an alien could file a motion to reopen or reconsider. In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their stay, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008), and it therefore directed the Attorney General to issue regulations to limit the number of motions to reopen and motions to reconsider that an alien may file and to specify the time periods for the filing of such motions. Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 5066.

The Attorney General promulgated the final regulations in 1996. Those regulations included time and numerical limits on motions to reopen and motions to reconsider, and also reaffirmed the longstanding bar on granting such motions filed by aliens who have left the United States. 61 Fed. Reg. 18,904-18,905 (8 C.F.R. 3.2(c)(1)-(2) and (d) (1997)).

c. In 1996, Congress amended the INA to codify certain procedures for filing motions to reopen and motions to reconsider. Congress provided that an alien "may file one motion to reconsider a decision that the alien is removable from the United States" and "may file one motion to reopen," and Congress codified the time and numerical limitations contained in the regulations. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (8 U.S.C. 1229a(c)(6) and (7)). Congress also repealed a longstanding statutory provision that precluded judicial review of removal orders if the alien had departed the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Congress did not, however, address

the departure bar that has long been contained in the regulations.

d. The Attorney General then promulgated regulations implementing IIRIRA, which retained the long-standing departure bar. 62 Fed. Reg. 10,321 (1997). The Attorney General explained that "[n]o provision of the new section [on judicial review in IIRIRA] supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." *Ibid.* In the Attorney General's view, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages [a] system [permitting immigration officials to grant such motions] might render." *Ibid.*

3. Petitioner is a native and citizen of Mexico who married a United States citizen and became a conditional legal permanent resident in 1995. Pet. App. 3. In 1997, he was convicted of battery; the victim was his wife. *Ibid.* On the basis of this conviction, the Department of Homeland Security charged petitioner with being removable as an alien convicted of a crime that qualified as an aggravated felony and a crime of domestic violence. *Ibid.*; see 8 U.S.C. 1227(a)(2)(A)(iii) and (E)(i).

Petitioner admitted the factual allegations supporting removability and did not seek any relief from removal. Pet. App. 3; Administrative Record (A.R.) 99. After a hearing, an IJ determined that petitioner was removable as charged and ordered him removed to Mexico. A.R. 99. Petitioner waived his right to appeal and was removed in 2003. Pet. App. 3. Three months later, the Seventh Circuit held in *Flores* v. *Ashcroft*, 350 F.3d 666, 671-672 (2003), that the offense petitioner commit-

ted does not qualify as either an aggravated felony or a crime of domestic violence for purposes of immigration law. Pet. App. 3-4.

4. Over three years later, petitioner filed a motion with an IJ, seeking to have his case reopened or reconsidered in light of *Flores*. Pet. App. 4; see A.R. 63-75. Petitioner acknowledged that his motion to reopen or reconsider was untimely, but requested the IJ to reopen his case *sua sponte*. Pet. App. 63; A.R. 71-72. Petitioner acknowledged the departure bar contained in 8 C.F.R. 1003.23(b)(1), but argued that it did not apply to *sua sponte* reopening. A.R. 73-74.

The IJ denied the motion. Pet. App. 62-65. The IJ noted that, whether the motion is properly characterized as a motion to reopen or a motion for reconsideration, it was untimely, and petitioner acknowledged that it was untimely in his motion. *Id.* at 63. The IJ then considered whether to grant petitioner reopening or reconsideration *sua sponte*. *Id.* at 63-64. The IJ determined that he lacked jurisdiction to grant *sua sponte* reopening or reconsideration, explaining that the departure bar contained in 8 C.F.R. 1003.23(b)(1) "precludes [an] IJ [from] exercis[ing] his general discretion in reopening and reconsidering proceedings" when an alien files the motion after he has departed the United States. Pet. App. 64. In so holding, the IJ rejected petitioner's argument that the regulation that generally grants IJs discretion to reopen or reconsider proceedings *sua sponte* trumps the departure bar. *Id.* at 64-65.

5. The Board dismissed petitioner's appeal. Pet. App. 59-61. Citing its prior decision in *In re G-N-C-*, 22 I. & N. Dec. at 288, the Board agreed with the IJ that the departure bar deprived the IJ of jurisdiction to consider a motion to reopen or reconsider filed after an

alien had departed the United States. Pet. App. 59-60. The Board also "agree[d] with the Immigration Judge's determination that the specific regulatory language prohibiting motions after the alien has departed the United States overrides the more general regulatory language affording the Immigration Judge the right to reopen or reconsider *sua sponte*." *Id.* at 60.

6. The court of appeals denied petitioner's petition for review. Pet. App. 1-56. Petitioner had argued that the departure bar regulation, 8 C.F.R. 1003.23(b)(1), was invalid because it conflicted with the provisions of the INA that address motions to reopen and reconsider, 8 U.S.C. 1229a(c)(6)(A) and (7)(A). In petitioner's view, because the INA permits an alien to file one motion to reopen or reconsider within certain specified time limits, the Attorney General may not by regulation deprive immigration officials of the discretion to grant such motions for aliens who have departed the United States. Pet. C.A. Br. 12-23.

The court of appeals rejected that argument and upheld the validity of the departure bar regulation. Applying the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court first determined that "the statute is simply silent" on whether an alien who has departed the United States may obtain reopening or reconsideration of his removal order. Pet. App. 21. The court explained that the relevant statutory text—which provides that "[t]he alien may file one motion to reconsider a [removal] decision," 8 U.S.C. 1229a(c)(6)(A), and that "[a]n alien may file one motion to reopen proceedings under this section," 8 U.S.C. 1229a(c)(7)(A)—does not evidence any clear intent about whether Congress "meant to repeal the post-departure

bars contained in the Attorney General's regulations." Pet. App. 21-22.

The court noted that the Fourth Circuit had reached a contrary conclusion in *William* v. *Gonzales*, 499 F.3d 329 (2007), but concluded that the dissenting judge in that case had the better of the argument that the statutory text did not speak to the departure bar issue. Pet. App. 14-21. The court of appeals agreed with the *William* dissent that Congress would have used more explicit language had it wished to repeal the longstanding departure bar, particularly because that bar had existed in the regulations for decades and the Attorney General had reaffirmed it in the regulations addressing motions to reopen, which Congress relied upon when it enacted the statutory requirements for motions to reopen. *Id.* at 17. The court stated that it was "not persuaded * * * that, by negative inference, Congress intentionally swept away forty years of continuous practice by the Attorney General." *Id.* at 22-23.

Having "concluded that the statute is not clear and unambiguous," the court of appeals determined that the Attorney General's regulation represented a "permissible construction of the statute" under step two of the *Chevron* framework. Pet. App. 22-23 (internal quotation marks omitted). The court explained that because Congress "has not merely failed to address a precise question but has also made an explicit delegation of rulemaking authority" to the Attorney General, the Attorney General's regulations should be "given controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 22 (internal quotation marks omitted). Here, the court explained, the regulation is reasonable because an alien's departure from the United States fundamentally changes his status un-

der the law: "whatever immigration status the removed alien may have possessed before is vitiated," and he is "in no better position after departure than any other alien who is outside the territory of the United States." *Id.* at 24 (quoting *In re Armendarez-Mendez*, 24 I. & N. Dec. at 655-656 (emphasis omitted)).

The court of appeals then noted that petitioner's case only concerned *sua sponte* reconsideration or reopening, because petitioner's motion to reconsider and to reopen was untimely and "he has waived any argument that he should be excused from those procedural requirements [*i.e.*, the time limits]." Pet. App. 25; see also *id.* at 33 n.1 (O'Brien, J., concurring) (petitioner "expressly acknowledged the untimeliness of his motion to reopen and/or reconsider in the agency proceedings"). The court also rejected petitioner's argument that the regulations that generally permit IJs and the Board to reopen or reconsider cases *sua sponte* trump the departure bar, agreeing with the Board that the more specific departure bar controls the more general regulations about *sua sponte* authority. *Id.* at 29. Finally, the court noted that it would not be able to review a denial of *sua sponte* reopening or reconsideration in any event, because there are no meaningful standards by which to judge the agency's exercise of discretion and the decision is one committed to agency discretion by law. *Id.* at 29-31.[1]

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[1] The court also rejected petitioner's arguments that the departure bar regulations should be interpreted to apply only to aliens whose proceedings are not yet final when they file their motions to reopen or reconsider, Pet. App. 25-27, and that application of the regulation to him would be arbitrary and capricious or violate his due process rights, *id.* at 28, 30-31. Petitioner does not renew those arguments before this Court.

One judge concurred, stressing that this case involves only a motion for *sua sponte* reconsideration or reopening, and not a motion that complies with the time limits set out in the statute. Pet. App. 31-34 (O'Brien, J., concurring). The concurring judge noted (*id.* at 31-32) that the only other court to consider that issue as of that time, the Fifth Circuit, had agreed that the departure bar, as applied to *sua sponte* motions, is fully consistent with the INA. See *Ovalles* v. *Holder*, 577 F.3d 288 (2009). One judge dissented, stating that he "would invalidate the challenged portion of 8 C.F.R. § 1003.23(b)(1) under the first step of *Chevron*." Pet. App. 34 (Lucero, J., dissenting).

7. Petitioner filed a petition for rehearing en banc, which was denied, with no member of the panel and no judge in regular active service requesting a poll. Pet. App. 66-67.

ARGUMENT

Petitioner renews his contention (Pet. 28-35) that the departure bar contained in 8 C.F.R. 1003.23(b)(1) is invalid because it conflicts with the statutory provisions governing motions to reconsider and reopen. Because, as petitioner has acknowledged, his motion is untimely (whether construed as a motion to reopen or a motion to reconsider), this case concerns only the IJ's *sua sponte* reopening or reconsideration authority. The court of appeals correctly upheld the validity of the departure bar in these circumstances. Moreover, although the Fourth Circuit has reached a contrary conclusion in considering *timely* motions to reopen, there is no disagreement in the circuits regarding whether the Attorney General may validly limit the ability of immigration officials to grant requests for *sua sponte* reconsideration or

reopening filed by aliens who have departed the United States. Moreover, this case would present a poor vehicle for considering the underlying legal issues because even if the IJ could consider petitioner's request for *sua sponte* reopening or reconsideration and denied it on the merits, the court of appeals would be unable to review that decision, because the decision whether to reconsider or reopen a case *sua sponte* is committed to agency discretion by law. Further review is therefore unwarranted.

1. This case concerns only a motion to reconsider and reopen that is untimely. In that circumstance, the issue the IJ must decide is whether to exercise his *sua sponte* discretionary authority to grant reopening or reconsideration. As explained above (at p. 2, *supra*), a motion to reopen must be filed within 90 days of entry of the final order of removal, 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), .23(b)(1). There is an exception for a motion seeking asylum or withholding of removal based on changed country conditions, 8 U.S.C. 1229a(c)(7)(C)(ii), but petitioner's motion did not seek reopening on that basis, and he has never contended that any exception to the 90-day deadline applies. Similarly, a motion to reconsider an order of an IJ or the Board must be filed within 30 days of the date of entry of the order. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2); see also p. 3, *supra*. Petitioner's motion was filed more than three and one-half years after his removal order was entered. Pet. App. 4. It was therefore untimely, and petitioner therefore could only request *sua sponte* reopening or reconsideration under 8 C.F.R. 1003.23(b)(1).

Petitioner has acknowledged throughout this litigation that he did not meet the statutory time require-

ments for filing a motion to reopen or reconsider and that he therefore can seek only *sua sponte* reopening or reconsideration. Pet. App. 24-25; *id.* at 32 n.1 (O'Brien, J., concurring); see Pet. 11-12. This case, therefore, only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening or reconsideration. Because petitioner did not file his motion within the time limits prescribed by statute, the statutory provisions regarding timely motions to reopen and reconsider—8 U.S.C. 1229a(c)(6) and (7)—do not apply to him and there accordingly can be no inconsistency between the departure bar regulation and those statutory provisions in this case.[2]

2. The court of appeals' decision is correct. As the court correctly observed, whether the departure bar regulation at issue is valid depends upon application of the *Chevron* framework. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Here, although the statute prescribes time and numerical limitations for motions to reopen and reconsider, it says nothing about whether an alien may obtain reopening or reconsideration after he has departed the United States, and it does not address *sua sponte* reopening at all.

The INA provides that "[t]he alien may file one motion to reconsider a [removal] decision" and states that

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[2] Petitioner also contends (Pet. 35-37) that this Court's review is warranted because the court of appeals stated that the untimeliness of his motion was an "alternative basis" for denying his petition for review. Pet. App. 24. That is a fact-specific and case-specific argument that does not warrant this Court's review. Moreover, the court's determination that the motion was untimely—which petitioner has conceded—simply underscores the conclusion that petitioner was relegated to requesting *sua sponte* reopening, and the departure bar regulations are plainly valid in that context.

"[t]he motion must be filed within 30 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(6)(A) and (B). With respect to motions to reopen, the INA provides that "[a]n alien may file one motion to reopen proceedings under this section" and requires that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i). As the court of appeals explained, these provisions do not by their terms address whether immigration officials may grant motions to reopen or reconsider filed by aliens who have departed the United States. Pet. App. 21-22. The court of appeals found that omission particularly telling, because the Attorney General's regulations have for decades specifically precluded immigration officials from granting motions to reopen or reconsider filed by aliens who have left the United States. *Id.* at 17-18, 21-22. Indeed, when Congress codified the time and numerical limitations on motions to reopen and reconsider in 1996, it left the departure bar unchanged in the regulations. *Id.* at 17-18; see pp. 5-6, *supra*. As the court explained, Congress's failure to take any steps to change or override the departure bar strongly suggests that it did not intend to disturb the agency's longstanding practice. See, *e.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). Accordingly, there is no conflict between the statutory language providing for motions to reopen and reconsider and the departure bar contained in the regulations.

Even if the statutory provisions addressing motions to reopen and reconsider were thought to clearly and unambiguously grant an alien who has departed the United States a right to one motion within the time limits specified, those provision are not at issue here, be-

cause petitioner has not complied with those time limits. That is, even if petitioner is correct that the INA "expressly provide[s] aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation," Pet. 7, the statute only gives aliens the right to file such a motion within the time limits specified in the statute. The Attorney General has, by separate language in the regulations, granted IJs and the Board the discretion to reopen cases on their own motion. See 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), .23(b)(1) (similar for IJ). But *sua sponte* reopening is entirely a creature of regulation; it is not mentioned in Section 1229a(c) at all. Because no statutory provision authorizes an alien to file a motion to reopen or reconsider outside the time limits specified, application of the departure bar to preclude IJs from exercising their discretion to grant *sua sponte* reopening or reconsideration cannot clearly and unambiguously conflict with the statutory text.

After concluding that the INA does not speak directly to the question, the court of appeals correctly determined that the departure bar is based on a permissible reading of the statute. Pet. App. 22-23. Petitioner does not challenge this aspect of the court of appeals' decision, instead making only a *Chevron* step one argument. See Pet. 29-35. In any event, as the court noted, Congress has expressly granted rulemaking authority to the Attorney General, see 8 U.S.C. 1103(g)(2), and the departure bar regulation therefore should be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Pet. App. 22 (internal quotation marks omitted).

Here, the Attorney General reasonably decided to categorically limit immigration officials from exercising their discretion to grant reopening for aliens who have departed the United States. As the court of appeals recognized, departure is a "transformative event" that fundamentally changes the alien's status under the law. Pet. App. 23 (internal quotation marks omitted). The Attorney General decided that once that event occurs, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render," such as improved accuracy of results. 62 Fed. Reg. at 10,321. That decision is reasonable in light of a central focus of Congress in IIRIRA, which was to place limits on aliens' ability to reopen and reconsider their cases and to expedite their removal from the United States. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 360 (1996). That focus is reflected in Section 1229a itself, which imposes certain limits on the alien, but does not limit the discretion of the government. Indeed, as this Court has noted, "protecting the Executive's discretion * * * can fairly be said to be the theme of [IIRIRA]." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). The repeated and longstanding determination by Attorneys General over many years to limit the discretion of immigration officials so that they may not grant motions to reopen or reconsider filed by aliens who have departed the United States is reasonable.

That is particularly true in the context of *sua sponte* reopening. IJs and the Board are never required to exercise their *sua sponte* authority, and they only do so in extraordinary circumstances. See, *e.g.*, *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999); also pp. 3-4,

infra; Pet. 25. Whether to exercise that authority is entirely entrusted to the agency's discretion, and that decision is not subject to judicial review. See pp. 22-23, *infra*. In the same way that the Attorney General decided to authorize *sua sponte* reopening—a procedural mechanism, not mentioned in the Act, available to IJs and the Board for consideration of an untimely motion in exceptional circumstances—he may reasonably decide to limit that mechanism to certain cases. See, *e.g.*, *Belay-Gebru* v. *INS*, 327 F.3d 998, 1001 (10th Cir. 2003) (observing that "no statutory language authorizes the [Board] to reconsider a deportation proceeding *sua sponte*" and that the regulations authorizing *sua sponte* reopening contain "no meaningful standard against which to judge the [Board's] exercise of its discretion"). There is, accordingly, no basis for invalidating the longstanding departure bar regulations, particularly in the context of *sua sponte* reopening or reconsideration.

3. Petitioner contends (Pet. 15-21) that review is warranted because the decision below conflicts with the Fourth Circuit's decision in *William* v. *Gonzales*, 499 F.3d 329 (2007). In that case, the Fourth Circuit concluded that the statement in Section 1229a(c)(7) that an alien "may file" one motion to reopen within the specified time limits "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country," and therefore conflicts with the departure bar regulations. *Id.* at 332.

The Fourth Circuit, however, did not address the timeliness of the alien's motion to reopen, or what would be the result if the only vehicle that would be available

to the alien was *sua sponte* reopening.[3] Here, by contrast, petitioner conceded that his motion was untimely and that he could only obtain reopening if the IJ decided to reopen his case *sua sponte*. Indeed, the court below specifically "distinguishe[d] this case from * * * *William*" on the ground that this case concerned only an untimely motion to reopen or reconsider. Pet. App. 25.

The other courts that have considered the departure bar regulations in the particular context of *sua sponte* reopening have rejected the aliens' challenges. In *Ovalles* v. *Holder*, 577 F.3d 288 (2009), the Fifth Circuit rejected such a challenge and found it unnecessary to address the validity of the departure bar for timely motions to reopen, explaining that, "[i]n asking us to invalidate [8 C.F.R.] 1003.2(d), [the alien] invokes statutory provisions that offer him no relief" because the alien's motion to reopen or reconsider was untimely. 577 F.3d at 295. The court explained that "because Sections 1229a(c)(6) and 1229a(c)(7) * * * do not grant [the alien] the right to have his facially and concededly untimely motion heard by the [Board], he cannot rely on those statutory provisions as a basis for contending that the [Board] was required to give *sua sponte* consideration to the merits of his * * * motion." *Id.* at 296. And, like the court below, the Fifth Circuit determined that the untimeliness of the alien's motion was a "key fact [that] distinguishes the present case from *William*." *Id.* at 295; see also *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 2802454, at *1 (5th Cir. July 9, 2010) (per curiam) (declining to reach the question whether

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[3] It appears that the motion in *William* may well have been untimely, 499 F.3d at 331, but the court of appeals did not address whether the motion was timely or consider timeliness in its analysis.

8 C.F.R. 1003.2(d) is contrary to 8 U.S.C. 1229a(c)(7)(A) because the motion to reopen was untimely).

The Second Circuit recently reached the same conclusion in the context of *sua sponte* reopening in *Zhang* v. *Holder*, No. 09-2628, 2010 WL 3169292 (Aug. 12, 2010). The court explained that "[t]here is no dispute here that the Attorney General's decision to provide the [Board] with such authority was a valid use of his rulemaking power under the INA," and "[i]f the Attorney General possesses the authority to vest *sua sponte* jurisdiction in the [Board]—and it is undisputed here that he does—then it stands to reason that he would also have the authority to limit that jurisdiction and define its contours through, among other things, the departure bar." *Id.* at *9. The court noted that the alien "ha[d] not argued that the *sua sponte* power itself is inconsistent with the statute," but found that unsurprising, because "there was no statutory basis for his motion." *Ibid.* Thus, the courts of appeals that have considered the context here have all upheld the validity of the departure bar regulations.

Petitioner cites (Pet. 17-20) a variety of other decisions, none of which conflicts with the decision below. As petitioner himself concedes, several decisions simply assumed the validity of the departure bar, without considering any statutory argument like the one petitioner makes here. See *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198, 1200 (6th Cir. 2006); *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-676 (5th Cir. 2003) (*sua sponte* context); see also Pet. 18 (in *Navarro-Miranda* "the Fifth Circuit applied the regulation without mentioning IIRIRA"); Pet. 19 (Sixth Circuit in *Mansour* assumed the validity of the bar "without considering any IIRIRA-related arguments").

In *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-442 (2007), cert. denied, 129 S. Ct. 37 (2008), the First Circuit upheld the departure bar against a different challenge than the one petitioner makes here. In that case, the court rejected the argument that Congress's repeal of 8 U.S.C. 1105a(c) (1994), which precluded judicial review of removal orders for aliens who had departed the United States, abrogated the Attorney General's authority to enforce the departure bar. 489 F.3d at 441. That is different from the argument here, where petitioner contends that the departure bar regulation conflicts with various provisions in Section 1229a. And in any event, the First Circuit's conclusion is consistent with the conclusion reached by the court below.

Finally, the Ninth Circuit has interpreted the departure bar regulation so as not to apply to aliens whose removal proceedings have been completed, but that case did not address whether the regulation is consistent with the INA. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007). The Ninth Circuit also has held that 8 C.F.R. 1003.2(d) does not apply to "withdrawal of a[] [motion to reopen] filed by a petitioner who has been involuntarily removed from the United States." *Coyt* v. *Holder*, 593 F.3d 902, 907 (2010). But that decision specifically addressed the portion of the departure bar regulation stating that an alien's departure from the United States "shall constitute a withdrawal" of a motion to reopen that has already been filed, 8 C.F.R. 1003.2(d), which was not the basis for the decision below, and it considered a different argument than petitioner makes here.[4]

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[4] In *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-595 (2010), the Seventh Circuit recently determined that the departure bar in 8 C.F.R.

To be sure, although this case concerns only a motion seeking *sua sponte* reopening or reconsideration, the court below did state its view that the regulation would be valid even in the context of a timely motion to reopen. But even so, any disagreement in the circuits on the broader question whether the departure bar regulations are valid for timely motions to reopen is limited to the Fourth and Tenth Circuits. See Pet. 15-17 (acknowledging that only two circuits have addressed that question). To the extent that issue may warrant this Court's review, the Court should wait for additional courts of appeals to address it, particularly because the Fourth and Tenth Circuits comprise less than five percent of the total immigration caseload in the courts of appeals. See Administrative Office of the U.S. Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 94-98 (2010) (Table B-3).

Contrary to petitioner's suggestion (Pet. 27-28), there is no disagreement in the courts of appeals about how this Court's recent decision in *Dada* v. *Mukasey*, 128 S. Ct. 2307 (2008), affects the departure bar. As petitioner himself notes (Pet. 27), the *William* court did not consider *Dada* because the decision in *William* predated *Dada*. Moreover, as the court below noted, "neither party in *Dada* specifically challenged the validity of the regulations," and the Court did not consider its validity. Pet. App. 13 n.3; see *Dada*, 128 S. Ct. at 2320. To the extent that *Dada* is read to indicate that the INA gives an alien an affirmative right to file a motion to reopen, 128 S. Ct. at 2319, that would apply only to timely

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1003.2 should not be interpreted to limit the Board's jurisdiction to consider such motions, but instead to bar the Board from granting such motions. But the court did not cast doubt on the validity of the departure bar itself.

motions to reopen, not untimely ones like at issue here. Finally, the fact that the other courts of appeals (including the Fourth Circuit) have not yet considered the impact of *Dada* on the departure bar provides another reason why certiorari is premature at this time.

4. This case would be a poor vehicle for considering the interplay between the departure bar regulations and the provisions of the INA addressing motions to reopen and reconsider, because this case involves only *sua sponte* reopening, where the ultimate decision whether to grant relief is entrusted to the broad discretion of immigration officials and is not judicially reviewable.

As petitioner acknowledges (Pet. 25), whether to reopen or reconsider a case outside the time limits prescribed by statute is entrusted to the broad discretion of the IJ and the Board. Both exercise that discretion sparingly, reserving it for truly exceptional situations. *In re G-D-*, 22 I. & N. Dec. at 1133-1134. Moreover, as the court below recognized (Pet. App. 30), all courts of appeals to consider the issue have agreed that once the IJ or Board has decided whether to exercise its *sua sponte* authority, that decision is not reviewable by the federal courts. See *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).[5]

Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). That

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[5] In *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that the courts of appeals have agreed that denials of *sua sponte* reopening are unreviewable because *sua sponte* reopening is committed to agency discretion by law. 130 S. Ct. at 839 n.18.

is true with respect to *sua sponte* reopening; the decision whether to reopen a case is entirely discretionary and there is "no meaningful standard against which to judge the agency's exercise of discretion." *Tamenut*, 521 F.3d at 1003. Further, unlike the statutory and regulatory provisions allowing an alien to file a motion to reopen or reconsider, the regulations permitting an IJ or the Board to reopen or reconsider a case *sua sponte* establish a procedural mechanism for immigration officials in aid of their own internal administration of immigration proceedings, and do not confer any privately enforceable rights on an alien. Thus, even if the IJ could consider petitioner's motion on its merits, the IJ's decision whether to exercise his *sua sponte* authority would be unreviewable.[6] Accordingly, if the Court wishes to consider whether the departure bar regulations are consistent with the provisions of the INA addressing motions to reopen and reconsider, it should do so in a case where the motion was timely filed.

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[6] Indeed, on remand in *William*, the Board denied the alien's motion on the ground that it was untimely and declined to exercise its *sua sponte* authority. See *William* v. *Holder*, 359 Fed. Appx. 370, 372-373 (4th Cir. 2009). The court of appeals then dismissed the petition for review, stating that it lacked jurisdiction to review the Board's decision not to exercise its *sua sponte* reopening authority. *Id.* at 373.

No. 09-1367

In The Supreme Court of the United States

MR. MARTIN ROSILLO-PUGA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent attempts to persuade this Court that Petitioner's case is not amenable to review because Mr. Rosillo-Puga ("Rosillo" or "Petitioner") filed his motion to reopen and/or reconsider outside the respective 90 and 30 day time limits, and pursuant to the Board of Immigration Appeals ("BIA") and/or the Immigration Judge's ("IJ") *sua sponte* authority to reopen at any time. Brief in Opposition ("Opp. Br.") at 11-12; 8 C.F.R. § 1003.23(b)(1)(IJ); see also 8 C.F.R. § 1003.2(b)(2) and (c)(2)(BIA). Respondent's position that there is no split among the circuits with respect to *untimely* motions to reopen or reconsider, pursuant to *sua sponte* authority, crumples like a house of cards in the face of the true facts – that the Fourth Circuit's decision in *William v. Gonzalez*, 499 F.3d 329 (4th Cir. 2007) involved precisely an untimely, *sua sponte* motion to reopen. In fact, this case is virtually identical, factually, to *William*, putting the Tenth and Fourth Circuits squarely at odds with each other over the validity of the regulatory departure bar.

Moreover, recent cases cited by Respondent, many of which are based in part on the mistaken belief that the motion at issue in *William* was timely, only add to the current state of confusion among the circuits over the effect and scope of the regulatory departure bar, and further illustrate the need for immediate and discerning judicial review of this case.

Ultimately, the BIA cannot be permitted, even in the context of a request pursuant to its *sua sponte* authority, to refuse to consider a request to reopen or reconsider a removal order on the grounds that it *lacks jurisdiction because the alien has departed the country*. This position leads to unfair and absurd results that are contrary to the purpose of the IIRIRA.

I. *William* Cannot Legitimately Be Read To Apply Solely To Timely Filed Motions To Reopen.

Respondent opens its argument with the assertion that in *William*, "although the Fourth Circuit has reached a contrary conclusion in considering *timely* motions to reopen, there is no disagreement in the circuits regarding whether the Attorney General may validly limit the ability of immigration officials to grant requests for *sua sponte* reconsideration or reopening filed by aliens who have departed the United States." Opp. Br. at 11. This assertion is wholly and inexcusably wrong.

It is difficult to see how the Government could make such a mistake from reviewing the *William* opinion. Nowhere in the *William* opinion does the Fourth Circuit so confine its decision. Moreover, it is abundantly clear, from the facts set forth in the opinion, that William's motion to reopen was indeed untimely. William was removed on July 11, 2005, presumably some time after issuance of the final

order of removal, yet he did not file his motion to reopen until December 21, 2005, more than five months later. *William*, 499 F.3d at 331. Moreover, the *William* opinion indicates that the motion to reopen was filed requesting the BIA to exercise its *sua sponte* authority stating that "William filed a motion to reopen immigration proceedings before the BIA in which he asserted that the *exceptional circumstances* of his case warranted reconsideration of his removal." *Id.* at 331 (emphasis added). This language refers expressly to the standard for *sua sponte* reopening. Opp. Br. pp. 3-4, *quoting In re G-D-*, 22 I&N Dec. 1132, 1133-34 (B.I.A. 1999) ("The Board and the IJs 'invoke [their] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly *exceptional circumstances*.'" (Emphasis added.)

While the *William* opinion's lack of express reference to *sua sponte* authority and timeliness might reasonably confuse perhaps even a circuit court, it is unfathomable that the Government would misunderstand. But, any confusion on the issue could easily have been resolved by review of either the BIA's opinion on remand, *In re Tunbosun Olawale William*, 2008 WL 5537807, or on subsequent appeal to the circuit court, *William v. Holder*, 359 Fed. Appx. 370, 2009 WL 5175986 (C.A. 4). Both opinions make it clear that, in fact, William's motion was not filed until "more than 26 months after the date when his

removal order became final, and more than 5 months after his physical removal from the United States." *See*, respectively, pp. 3 and p. 372 (setting out the specific dates).[1] Moreover, both opinions specify that William's request was made pursuant to the BIA's *sua sponte* authority to reopen a case "at any time." *Id.*, respectively, at 3 and 373.

There is simply no credible basis for assuming or representing that the *William* court intended to confine its ruling to timely filed, non-*sua sponte* motions to reopen or reconsider. The Fourth Circuit concluded broadly:

> [W]e believe it is evident that 8 C.F.R. § 1003.2(d), containing the post-departure bar on motions to reopen, conflicts with the statute by restricting the availability of motions to reopen to those aliens who remain in the United States. Therefore, we conclude the regulation lacks authority and is invalid. Id. at 334.

The lack of reference to timeliness or *sua sponte* remedies can be explained by the fact that both the IJ, and then the BIA, denied William's motion to reopen, in the first instance, exclusively on the basis that it could not hear William's request once he was removed from the United States. The Fourth Circuit

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[1] Respondent begrudgingly acknowledges that the motion in *William* "may well have been untimely" in a footnote on page 18 of its brief. See Opp. Br., at 18, n.3.

states as much in its opinion when describing the disposition below: "The BIA refused to consider William's motion to reopen – thereby effectively denying it on procedural grounds – reasoning that William had already been removed from the United States, and in those circumstances, 8 C.F.R. § 1003.2(d) bars the filing of a motion to reopen." *William*, 499 F.3d at 331. Again, review of the subsequent proceedings confirms this fact as well. *See In re Tunbosun Olawale William*, 2008 WL 5537807 at 1 ("we denied [William's] motion pursuant to 8 C.F.R. § 1003.2(d)(2006), which provides in relevant part that a motion to reopen shall not be made by or on behalf of a person who is the subject of removal proceedings after his departure from the United States.") and *see, similarly, William v. Holder*, 359 Fed. Appx. at 371-72.

Additionally, there was no need to reference *sua sponte* authority in the *William* opinion, because despite the fact that William's motion was untimely, and therefore requested that the BIA reopen pursuant to its *sua sponte* authority, Respondent did not argue in *William* that there was no statutory authority for its *sua sponte* powers. Rather the Respondent took the position that the statutory language was silent as to whether it intended to apply to aliens who have departed the country. *William*, 499 F.3d at 332.

Thus, this case cannot be distinguished from *William* on either of the grounds asserted by Respondent. The Fourth Circuit remanded *William* to the BIA knowing both that the motion to reopen at issue was untimely, and that it was brought pursuant

to the BIA's *sua sponte* authority. Similarly, the Tenth Circuit's opinion below does not limit itself to untimely or *sua sponte* motions as the Government would like the Court to believe. Rather, the Tenth Circuit held: "We agree with the dissent's position [in *William*] and conclude that 8 C.F.R. 1003.23(b)(1) (like 8 C.F.R. 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. 1229a(c)(6)(A) or (7)(A)." *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009). Like the Fourth Circuit's holding in *William*, the Tenth Circuit put no qualifications on the scope of its decision. It held simply that the regulatory departure bar was a valid exercise of discretion, regardless of the nature of the motion to which it was applied.

In the end, even if Respondent's characterization that this case "only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening or reconsideration" is accepted as true, a fact not supported by the broad holding in the case below, it still represents a clear split between, at least, the Fourth and Tenth Circuits as to the effect of the unambiguous language of 8 U.S.C. § 1229a(c)(7)(A) on the Agency's application of the departure bar, in the context of *sua sponte* motions.

II. Recent Circuit Court Cases Illustrate The Need For Review.

There can be no dispute that there is a conflict between the Fourth and Tenth Circuits on whether the regulatory departure bar is valid. This split has been expressly recognized by, at least, the Seventh Circuit in *Marin-Rodriguez*, 612 F.3d at 592, and the Ninth Circuit in *Coyt v. Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010). The issue has been thoroughly reviewed and the subject of both majority and dissenting opinions in the Fourth and Tenth Circuits. There is no reason to delay review of this motion as Respondent suggests, for more Courts of Appeals to address it. Opp. Br. at 21. Rather, more Courts of Appeals have addressed the issue since this Petition was filed, and the confusion over the validity of the departure bar only grows.

Since Rosillo filed this Petition in May 2010, both the Second and Seventh Circuits have ruled on the validity of the regulatory departure bar, taking the opposite positions from each other, with the Seventh Circuit following *William* and the Second Circuit declining to follow *William*. *See Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. July 14, 2010) and *Zhang v. Holder*, 2010 WL 3169292 (C.A. 2, Aug. 12, 2010). The different approaches taken in these cases, both from each other, and from the Fourth and Tenth Circuit's analysis on the validity of the departure bar, presents an increasingly compelling reason to review this case now.

In *Marin-Rodriguez* the Seventh Circuit expressly acknowledged that it reached the same result as the Fourth Circuit in *William*, but for different reasons relying on this Court's recent and post-*William* opinion in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, ___ U.S. ___, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009). *Id.* at 594. The Seventh Circuit framed the issue as whether the BIA "lacks jurisdiction to reconsider or reopen any of its decisions after the alien has left the United States." *Id.* at 592. The court held:

> As a rule about subject-matter jurisdiction, §1003.2(d) is untenable. The Immigration and Nationality Act authorizes the Board to reconsider or reopen its own decisions. It does not make that step depend on the alien's presence in the United States. * * * The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks "jurisdiction" – which is to say, adjudicatory competence, see *Reed Elsevier, Inc. v. Muchnick*, ___ U.S. ___, 130 S.Ct. 1237, 1243, 176 L.Ed.2d 17 (2010) (collecting cases) – to issue decisions that affect the legal rights of departed aliens.

Marin-Rodriguez v. Holder, 612 F.3d 591, 593-94 (7th Cir. 2010). The court of appeals took the position that *Union Pacific*, in which this Court determined that "agencies directed by Congress to adjudicate particular matters" may not "decline to exercise [that jurisdiction]," was controlling. *Union Pacific*, 130 S.Ct. at 590; *Marin-Rodrigu[illegible]*, 612 F.3d at 594 ("We think

that *Union Pacific* is dispositive in favor of the holding in *William* – though on a rationale distinct from the fourth circuit's.") Notably, as in *Marin-Rodriguez*, the sole reason for denying Rosillo-Puga's claim expressed by the BIA was its interpretation that it lacked jurisdiction to hear the case because the alien had departed the United States.[2]

Conversely, in *Zhang v. Holder*, 2010 WL 3169292 (C.A. 2), the Ninth Circuit held that the BIA's determination that the departure bar deprived it of jurisdiction to hear a *sua sponte* motion to reopen once the alien had departed was entitled to deference. However, in denying the petitioner's request for review, the Ninth Circuit recognized some "superficial tension" between its ruling, and the Seventh Circuit's decision in *Marin-Rodriguez*, and further distinguished itself from *Marin-Rodriguez* and *William* on

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[2] The court noted that the motion to reopen at issue in *Marin-Rodriguez* was timely, referring to another 2010 case, *Munoz De Real v. Holder*, 595 F.3d 747 (7th Cir. 2010), in which the Seventh Circuit denied the immigrant's appeal on the basis that his motion to reopen was untimely. In deciding *Munoz*, however, the Seventh Circuit found that the BIA had actually considered the request to exercise its *sua sponte* authority to reopen, but expressly declined to do so. *Id.* at 750. Additionally, the Court was under the mistaken impression that the motion to reopen in *William* was timely, when it was not. *Id.* at 749. ("Munoz de Real urges us to join the Fourth and Ninth Circuits, which have ruled that immigration courts may hear motions to reopen filed on behalf of departed aliens . . . This court need not determine the effect of the departure bar in this case. The reason is that Munoz de Real's motion to reopen was time-barred.")

the basis of timeliness. *Id.* at *11 ("Because the petitioner's only motion for reconsideration was timely under the INA, the facts of *Marin-Rodriguez* resemble those considered by the Fourth Circuit in *William*.") This incorrect assumption – that the *William* court dealt with a timely filed, *i.e.*, non-*sua sponte* motion, rather than an untimely *sua sponte* motion, was undoubtedly advocated by the Government's attorneys, as they have attempted to advocate here.[5]

These recent decisions rendered after the Tenth Circuit's opinion in the case below, clearly illustrate the importance of this recurring issue. Furthermore, the divergent approaches taken by the courts to address the validity of the regulatory departure bar weighs compellingly in favor of review.

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[5] The opinions in the Fifth Circuit cases cited by Respondent in support of its attempt to stymie judicial review in this case, *Ovalles v. Holder*, 577 F.3d 288 (2009) and *Al-Mousa v. Holder*, No. 07-61003, 2010 WL 2802454 (5th Cir. July 9, 2010), were similarly founded, at least in part, on the Court's mistaken belief that *William* involved a timely, and thus, non-*sua sponte* motion to reopen or reconsider. Respondent expressly acknowledges this fact. See Opp. Br. at 18 ("And, like the court below, the Fifth Circuit determined that the untimeliness of the alien's motion was a 'key fact [that] distinguishes the present case from William.'") *Ovalles*, 577 F.3d at 295; *Al-Mousa*, at *1.

III. Review Is Necessary To Avoid An Unfair And Absurd Result.

This case illustrates an extremely important, and recurring issue warranting this Court's immediate attention because of the absurd and unfair result to which the Government's position leads. The IJ and BIA avoided considering the merits of Petitioner's case, in which he alleges exceptional circumstances and a gross miscarriage of justice warranting *sua sponte* reopening, solely because he followed the law and allowed himself to be removed from this Country.[4] Had he stayed or returned illegally, Petitioner could have filed his motion, and under the current state of the BIA's interpretation of the law, the IJ would have been forced to make a determination of whether to exercise its discretion to reopen or reconsider the case. The Government's stance on this issue is absurd, unfair, and inconsistent with the recognized overriding purpose of the IIRIRA – "expedit[ing] physical removal of those aliens not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations." *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010). The Government should not be permitted to bypass its

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[4] Petitioner did not argue the exceptional circumstances that warrant reopening of his removal proceedings below. That issue was not presented to the circuit court by the BIA opinion on appeal which denied Petitioner's motion solely for lack of jurisdiction pursuant to the regulatory departure bar. See Cert. Pet. at 35-36.

responsibilities based upon a self-imposed arbitrary rule at odds with statute, common sense and fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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